UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Case No. 01-1139 (JKF)
	.	
W.R. GRACE & CO., et al.,	.	
	.	824 Market Street
	.	Wilmington, DE 19801
	.	
Debtors.	.	
	.	January 25, 2010
. . . . .	.	9:39 a.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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THE COURT: This is the matter of W.R. Grace, Bankruptcy Number 01-1139. The list of participants by phone is Scott Baena, Janet Baer, Ari Berman, David Bernick, Terese Best, David Blabey, Deanna Boll, Thomas Brandi, Peg Brickley, Justin Brooks, Oliver Butt, Elizabeth Cabraser, Douglas Cameron, Christopher Candon, Matthew Cantor, Richard Cobb, Tiffany Cobb, Jacob Cohn, George Coles -- I apologize, there are two lines that are not printed here, I believe they are Mr. Craig and Ms. Davis, but it's difficult to see, so if that is not the case and I miss anyone, when I'm finished, I'll take entries from those people.

Michael Davis, Elizabeth DeCristofaro, Martin Dies, Christopher Dombroski, Melanie Dritz, Terrance Edwards, Marion Fairey, Jeffrey Farkas, Debra Felder, Jordan Fisher, Theodore Freedman, Jeff Friedman, Michael Giannotto, Daniel Glosband, Christopher Greco, James Green, John Greene, Robert Guttmann, Sarah Harnett, Robert Horkovich, Christina Kang, Brian Kasprzak, Stuart Kovensky, Matthew Kramer, Lewis Kruger, Elli Leibenstein, Eric Leon, Michael Linn, Peter Lockwood. Would you folks please put your lines on mute, I'm getting noise in the background that sounds like children playing.

Alan Madian, Peri Mahaley, John Mattey, Matthew Moloci, Tara Mondelli, Kate Orr, Merritt Pardini, David Parsons, Margaret Phillips, John Phillips, Mark Plevin, Francine Rabinovitz, Joseph Radecki, Natalie Ramsey, Traci Rea,

James Restivo, Andrew Rosenberg, Ilan Rosenberg, Samuel Rubin, Alan Runyan, Jay Sakalo, Robert Sales, Darrel Scott, Michael Hoy, Michael Shiner, Robert Siegel, Walter Slocombe, Daniel Speights, Shayne Spencer, David Turetsky, Edward Westbrook, Richard Worf, Robert Wyron, Rebecca Zubaty and -- well, this John Lhota is on the wrong call.

Did I miss anyone on the phone?

(No audible response)

THE COURT: Okay. Operator, are you able to put those lines on mute until people speak? I'm getting feedback.

COURT CALL OPERATOR: Yes, Your Honor, I'm doing that right now.

THE COURT: Thank you. I'll take entries in court, please.

MR. BERNICK: David Bernick for Grace, Your Honor.

MR. FREEDMAN: Theodore Freedman for Grace, Your Honor.

MS. BAER: Janet Baer for Grace, Your Honor.

MR. O'NEILL: Good morning, Your Honor, James O'Neill for Grace.

MR. FRANKEL: Good morning, Your Honor, Roger Frankel from Orrick Herrington on behalf of David Austern, the PI FCR.

MR. FINCH: Good morning, Your Honor, Nathan Finch for the ACC.

MR. MONACO: Good morning, Your Honor, Frank Monaco

on behalf of the Crown.

MR. HOGAN: Good morning, Your Honor, Daniel Hogan on behalf of the Canadian Zonolite Claimants and representative counsel before the CCAA.

MR. McDANIEL: Good morning, Your Honor, Garvan McDaniel and Carl Pernicone for Arrowood.

MR. TACCONELLI: Good morning, Your Honor, Theodore Tacconelli for the Property Damage Committee.

MR. SANDERS: Good morning, Your Honor, Alex Sanders PD FCR.

MR. BROWN: Good morning, Your Honor, Michael Brown and Warren Pratt for OneBeacon, Seaton, Geico and Republic.

MR. HARVEY: Good morning, Your Honor, Matthew Harvey for Travelers Insurance.

MR. RICH: Good morning, Your Honor, Alan Rich for the PD FCR.

MR. ROSENBERG: Good morning, Your Honor, Andrew Rosenberg for the Bank Lenders.

MR. COBB: Good morning, Your Honor, Richard Cobb for the Bank Lenders.

MR. WISLER: Good morning, Your Honor, Jeffrey Wisler on behalf of Maryland Casualty Company.

MS. CASHMAN: Good morning, Your Honor, Megan Cashman for Fireman’s Fund.

MR. PASQUALE: Good morning, Your Honor, Ken Pasquale

from Strook, for the Creditors Committee. And, with me is my colleague Arlene Krieger.

THE COURT: Is that everyone? Ms. Baer, good morning.

MS. BAER: Good morning, Your Honor. Your Honor, on the agenda, item number one is the continued Massachusetts Department of Revenue objection. I'm pleased to say we have resolved that matter.

THE COURT: Oh.

MS. BAER: We're now working on the documentation and we know that the final notes and the like are not supposed to come until February, so we'd like to just kick this over to March. Hopefully, we'll have it done in March, if not, it'll be April, but we've finally gotten there.

THE COURT: All right.

MS. BAER: Your Honor, agenda item number two is the 25th omnibus objection. We've resolved a few more, but there's still a few left that we're working on, and so we'd like to just continue that again to the February hearing in the hope that we can resolve some more of them.

THE COURT: Okay.

MS. BAER: Your Honor, agenda item number three was Fireman's Fund lift stay motion. The Fireman's Fund settlement has now been -- is now a final order and, therefore, the lift stay motion is moot. I don't know if Your Honor needs

anything.

THE COURT: I do. I either need it withdrawn or an order that indicates that it's moot, so that I can close it on the record.

MS. BAER: We'll prepare something and work with Fireman's Fund to get that to you.

THE COURT: All right.

MS. BAER: Your Honor, agenda item number four was General Insurance Company's motion to file a late proof of claim. Your Honor has entered an order, an agreed upon order, on that matter, so that is over and resolved.

Your Honor, agenda items number five and six relate to Canadian special counsel application. We've had some, I think, very productive discussions this morning and I will turn the podium over to Mr. Freedman, who can discuss that and where we stand.

THE COURT: All right. Thank you.

MR. FREEDMAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. FREEDMAN: There were two objections to this application and we have resolved them both.

With respect to the objections that go -- that were filed by the Crown, the Crown has agreed that with respect to the matter that's before the Court today, which is the appointment of the CCAA representative counsel, as special

counsel in this case, to Canadian ZAI claimants, the Crown will withdraw its objection to that appointment.

But to be clear, the Crown and their counsel will speak for itself, but they will reserve all of their objections to any subsequent fee application and whether or not it would be appropriate to make a payment or to award any fees in that representative counsel capacity.

The matter before the Court today was simply for the appointment, that I will remind the Court is one of the conditions to the new Canadian settlement agreement that the CCAA representative counsel be appointed as special counsel in this proceeding, as special counsel for purposes of representing Canadian ZAI claimants. The Crown is, as I said, withdrawing its objection to that appointment, but preserving all of its objections to any subsequent fee application.

THE COURT: But the settlement sets out the fees. It says --

MR. FREEDMAN: No. The settlement -- that is a matter of some confusion from the settlement. There is -- on this appointment, there is absolutely no reward of fees. What there is, both the prior settlement, as to which there was no objection, and this settlement, does provide that under the fund that will be established in Canada, a portion of that fund will be made available to the Canadian representative counsel with respect to their work in connection with the ZAI PD

distributions, and management of that fund. And, those monies, therefore, will be available in that Canadian fund. That's different from what we presume will be sought by the Canadian counsel following this appointment. That is, following this appointment, they will subsequently come to the Court and ask for authority to be paid in their capacity as special counsel, presumably for contributions to the case. The Court will then be able to evaluate all the facts, including what the prior -- what the settlement actually requires by way of establishing a fund and other relevant facts, in order to determine whether an award is appropriate.

But there's nothing in what is being sought today, which would provide for the approval of a payment to the Canadian counsel at this time.

THE COURT: Okay. I think I'm looking at the right -- I'm looking at Exhibit A to the CCAA representative counsel's reply, which is attached to Docket Number 24158, which is the terms of the settlement and it says, "On the effective date as defined in the first amendment, plan, et cetera, the asbestos PD Trust shall immediately transfer to the ZAI PD claims fund, the following..." and then it lays out what that is. Wait, I think I'm looking at the right -- I must be looking at the wrong -- I apologize. I'm looking at the wrong place.

I thought there was a $2 million fee and then a

$250,000 fee and then other fees that were to be paid, but I'm looking at the wrong --

MR. FREEDMAN: Your Honor, there are fees of that nature that are baked into the ZAI PD settlement, which is part of the plan. And those fees, actually, were there in the prior settlement.

THE COURT: Yes.

MR. FREEDMAN: It's the same provision that is what was negotiated, was that there would be certain fees made available pursuant to those Canadian settlements with respect to ZAI PD that would be part of the fund that was administered and, frankly, which the Canadian Court, by approving that settlement, has effectively approved.

That is not --

THE COURT: Wait. The Canadian Court approved the fees?

MR. FREEDMAN: The Canadian Court approved the settlement and the settlement contemplates that those fees would be paid. So, should the plan go effective, should the Class A treatment, which is this particular treatment, be approved by the Court as part of the whole confirmation of the plan, then we will implement the Canadian settlement and those fees will be paid as part of that settlement.

THE COURT: Right.

MR. FREEDMAN: And, I wanted --

THE COURT: And there are going to be more fees sought, other than this? I mean, isn't this a settlement? I apologize, Mr. Freedman, I'm just confused. It says they're going to be paid $2 million and it says in respect of legal fees and disbursements, that's in the past. The next paragraph then says, that another $250,000 Canadian are to be set aside for future legal fees and disbursements. So, you're telling me there are going to be more fees?

MR. FREEDMAN: To the extent that they can come in and justify it. I believe what they probably have in mind is that there is going to work related to PI claims, that they're going to be responsible for prosecuting and that is outside the ZAI PD settlement. And, what they're going to seek to ask the Court for approval is fees that arise from their services in that regard.

THE COURT: Okay.

MR. FREEDMAN: Totally different set of services.

THE COURT: All right.

MR. FREEDMAN: But, again, by approving this application, the Court is not in any way approving any payment of fees. If the Court decides to confirm the plan with the settlement as negotiated, intact, then that will have the effect of approving this package of fees that have already been approved, but it's not -- this application has no bearing on that.

THE COURT: Okay.

MR. FREEDMAN: And as I said, Crown has made clear that it will be preserving its rights to object to any subsequent application to this Court and with respect to the special counsel fees that might flow from the order that the Court would enter today, hopefully, approving that application.

THE COURT: Okay. I guess that's still what's confusing me. It seems to me if the settlement is approved, the fees are already determined, on the property damage side. I appreciate the distinction and thank you for that clarification. But on the property damage side, it seems as though the fees will already be approved, they're part of the settlement.

MR. FREEDMAN: Right. And I don't believe that the Crown would be objecting to that piece of the settlement.

THE COURT: Okay.

MR. FREEDMAN: What they would be preserving the right to object to, is if there is a subsequent application under 503 or, by virtue of this Court's approval, of the special counsel status, for additional fees, then they would object if they feel that that's warranted.

THE COURT: All right. I understand, thank you.

MR. FREEDMAN: Okay. So, that's the first objection and it's been resolved as I've described.

The second has to do with a concern of the future

claimants representative for PI claims as to the potential confusion as to who's representing whom, and I'll let Mr. Frankel describe the language that's been worked out on that, but I understand that there has been a resolution of language on that.

THE COURT: All right. Mr. Frankel.

MR. FRANKEL: Good morning, again, Your Honor.

THE COURT: Good morning,

MR. FRANKEL: May I hand up an order?

THE COURT: Yes.

MR. FRANKEL: Thank you.

THE COURT: Thank you.

MR. FRANKEL: Your Honor, I think that we filed a response, not an objection, because we were concerned that there might be some confusion over the role of Mr. Austern as the FCR in this case, for PI, and the role of CCAA counsel because the order appointing them in Canada is broad and appears to include future claimants, also.

What this clarification -- and this order is actually the same order that was submitted, except for the proviso in paragraph one of the submitted order. What this clarifies is that Mr. Austern will continue to represent all PI demand holders, future claims, in this case, including ZAI personal injury demand holders, from Canada or anywhere else and that really is not a change in his role as the PI FCR.

What we've been asked to clarify, and we can clarify, is we have no intention of representing demand holders in the Canadian proceedings. Mr. Austern was appointed as the FCR under 524(g) of the code, in this case. That is his role, to represent demand holders in this case and not to represent them in connection with other proceedings that may go on somewhere else. So, we think this language clarifies it, we've shared this with Canadian counsel and Mr. Hogan and we think this resolves our response to the application.

THE COURT: Okay. May I hear from Mr. Hogan first, and then I'll get back to the Crown, Mr. Monaco? Is this language acceptable, Mr. Hogan?

MR. HOGAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. HOGAN: David Hogan, on behalf of the Canadian Zonolite claimants and rep counsel.

Yes, Your Honor, it is, subject to those provisos that we asked Mr. Frankel to enter on the record, so that it was clear from the Canadian rep counsel's perspective, that the future claims rep would not be appearing before the CCAA court for the purpose of representing holders of claims in that proceeding.

Your Honor, I'm sort of the last wheel here, even though these are my applications. For the record, Your Honor, I'd just like to note that in court today are two of the rep

counsel, David Thompson and Matt Moloci of the Scarfone Hawkins firm and they're here today to the extent the Court had any questions. I doubt you will.

THE COURT: I have one.

MR. HOGAN: Which is?

THE COURT: Why I have an application a year, almost two years, 18 months after the fact, to have this appointment go nunc pro tunc. I don't see any basis for doing that in the Third Circuit under the case law.

MR. HOGAN: Well, Your Honor, you'll recall that the Court has already entered a substantial contribution order for these same counsels, up to the point of September 1st, 2008, and pursuant to the negotiations which resulted in the creation of the amended and restated minutes of settlement, it was negotiated that the fees would be captured much the way they were with regard to the 503(b), I guess the (b)(4) motion that we filed for those claims. And so, the intent of both the debtor, Grace, Canada and rep counsel, was to effectively capture the fees for the assistance that rep counsel gave to the confirmation process and the creation of the first amended plan of reorganization.

THE COURT: That may be the case. Tell me how this application meets In Re Arkansas and F.S. AirLease because that's a problem. I have bankruptcy counsel from Delaware and if anybody in the world ought to know how to get themselves

appointed timely in a case, it's Delaware counsel and I don't have a timely application. I just don't see how I do this, nunc pro tunc, to September of 2008.

MR. HOGAN: Well, Your Honor, the problem that creates for us is that as you know, I'm sure from reading the amended restated minutes of settlement, is that what was negotiated by rep counsel and Grace Canada, and then the debtors, provides for this and absent the Court's approval, it blows up the minutes of settlement.

THE COURT: You're going to have to tell that to the Third Circuit. They wrote those cases, I only apply that law.

MR. HOGAN: Your Honor, I understand that. It's just more of a practical concern. I've read those cases and I understand the dilemma. In fact, Your Honor, in preparing these motions to file with the Court, I realized, and even spoke with the U.S. Trustee's Office about the nature of these applications and the fact that we're, effectively, trying to put a square peg in a round hole, because the code doesn't specifically provide for the creation of special counsel in this context.

So, what we did, Your Honor, is we went back and looked at how special counsel was appointed for the U.S. ZAI claimants in this case, wherein the Court agreed to approve the payment of the fees for special counsel for the U.S. ZAI claimants with regard to the Science trial and we used that as

a template in order to create this application.

THE COURT: But that was timely. They got approval before the Science trial happened, not after they had done all the work.

(Conversation between Mr. Hogan and Bernick)

MR. HOGAN: I understand. Well, I'm going to let Mr. Bernick speak to that issue, Your Honor, instead of --

MR. BERNICK: I'm going to let Mr. Freedman speak.

(Laughter)

THE COURT: There was a nunc pro tunc aspect to that order, if that's what you're going to remind me about. And, yes, I understand that that's the case, but the reason for it was because those counsel had already been appearing on behalf of the ZAI claims, the issue was whether or not they could be adequately compensated to do a representative trial and that was worked out in that fashion. So, the circumstances just aren't the same.

MR. FREEDMAN: Your Honor, the circumstances may be different in that case, but I think that the circumstances here are still compelling and they are compelling because this represents a renegotiation of a deal that expired in October. And it's absolutely essential that the Canadian situation be resolved fully and completely under Section 524(g).

As events transpired, that renegotiation required certain changes and did require work by the representative

counsel to further the proceedings and get us to a point where we could have a deal that we could bring to the Court and bake into the plan that's currently before the Court.

So, what exactly is the right point in time for that nunc pro tunc to compel a further award of fees is a question, but the issue is that there is a substantial contribution that will effectively be the standard that this Court is going to apply when an ultimate fee application is brought before the Court and all that this does is to recognize that this counsel has been acting on behalf of a constituency which it is authorized to act on behalf of, under Canadian law, in these proceedings and it's appropriate to make clear for the record that their activities relate back to that last date that the Court awarded a fee application.

There is an overlapping jurisdiction here. They have been serving their clients in connection with the Grace case and, ultimately, it would be appropriate for them, particularly given the fact that they had to renegotiate the deal, to come forward and seek further status and clarification of their status in this court.

THE COURT: Well, that's all well and good. I don't hear a word that tells me how I get around the Third Circuit law when I've got experienced bankruptcy counsel, who know that they have to get approved by the Court before they can be paid as professionals in the case. They don't need to be appointed

in order to seek a special contribution award, they weren't appointed the last time in order to seek that award. So, if that's what it's going to be and that's the standard to apply, I don't even want them appointed as special counsel because then the standards are different. So, I'm hearing two separate things, neither of which I can reconcile with Third Circuit case law.

MR. FREEDMAN: Well, it's important to remember that they are representing a group of claimants and not seeking appointment under Section 327.

THE COURT: Yes.

MR. FREEDMAN: And to the extent that the Third Circuit case law that you're talking about has to do with debtor representation, this is a different situation.

THE COURT: You think the Third Circuit is going to apply it differently to creditors' counsel as opposed to debtors' counsel, Mr. Freedman?

MR. FREEDMAN: I think that it would be appropriate to look at the fact that these are Canadian counsel that are dealing in a 524(g) case, where we're trying to resolve a huge block of Canadian claims that because of the expiration of the deal that was made, because of circumstances related to just getting the plan confirmation process completed. They were required to provide additional services and what they're simply asking for, again, is just simply have their status confirmed

for purposes of what they have already been doing.

THE COURT: Well, I can confirm that status, as of the date the application was filed. I still don't see a basis for nunc pro tuncing this application. They have local counsel, they've appeared in almost every proceeding in this case that has anything to do with Canadian issues that are relevant to their -- in fact, I think they have appeared in everyone that's been relevant to Canadian issues and I simply don't see a basis for a nunc pro tunc approval under this circuit. But I also don't see why it's needed if the issue is a substantial contribution.

MR. FREEDMAN: So, as I understand it, the Court is indicating that it would be comfortable making the appointment nunc pro tunc to the date of the application and that that would not preclude them from seeking substantial contribution, going back to whenever they can demonstrate that they made that contribution and haven't yet been confirmed.

THE COURT: Right. Mr. Hogan?

MR. HOGAN: Your Honor, first and foremost, I was going to ask that the Court acknowledge our involvement, and we entered our appearance in June of 2006 and as the Court has indicated, we have appeared for every hearing as it relates to Canadian Zonolite claims.

The application that we filed provided, as a basis, again, because of the statutory predicate, 503, and so based on

what I'm hearing the Court tell us, you're agreeable to appointing representative counsel as special counsel within the context of this case and will leave, effectively, for another day, the application for the reimbursement of fees, pursuant to a 503 motion based on substantial contribution.

THE COURT: Right. It seems to me that if the Canadian representatives wish to have some formal recognized status hearing, that it's appropriate to do it as of the date of the application now that the objections to that have been resolved. The problem I still face is the nunc pro tunc aspect, but to the extent that there's a substantial contribution award that's going to be requested, you don't have to be appointed in any capacity by this Court for making the substantial contribution anyway. So, I don't think having the appointment going forward, as opposed to nunc pro tunc to September of 2008, prejudices the ability of the representatives to apply for a substantial contribution award, up to the date of appointment. After the date of appointment, I'm not so sure it's a substantial contribution issue any longer.

I mean, if you're going to have a recognized formal status, you get yourselves into the fee application process.

MR. HOGAN: Of course, Your Honor. Your Honor, if I could, I want to redirect your attention back to the amended restated minutes of settlement because you had some questions

early on and as this was my application, I wanted to just clarify a couple of thing for the record.

THE COURT: Okay.

MR. HOGAN: If you would, Your Honor, turn to paragraph 16 of that agreement. And that provides, Your Honor, as you can read, that Grace shall consent and support CC rep counsel's application seeking appointment of special counsel for Canadian ZAI claimants in the U.S. proceeding, retroactively, to September 1, 2008 and going forward to the date of the U.S. confirmation order. Just because I knew you were having some difficulty finding some of these provisions.

And then 17 provides that the CC rep counsel should make application for approval or payment of CC rep counsel's reasonable fees and expenses, including matters relating to the original settlement, Canadian settlement approval, the Canadian ZAI PD claims notice program, all of which we went through, Your Honor, the amended and restated minutes of settlement communication with Canadian ZAI claimants, the U.S. confirmation order and all of the matters relating to the interests of Canadian ZAI claimants and contribution and support of the first amended joint plan.

So, I just wanted to make sure that that was on the record, Your Honor. And then finally --

THE COURT: But, I thought those were the substantial contribution awards that were already approved by this Court?

What did I already approve?

MR. HOGAN: You -- a substantial contribution order was entered up to August 31st, 2008.

THE COURT: Right. Which was the original settlement, the Canadian settlement approval --

MR. HOGAN: It wasn't the notice program, however. Everything -- the notice program, the amended and restated minutes of settlement.

THE COURT: Right. It included some but not all of these. I am not going to reopen that issue of something that I've already ordered. So, if this settlement is part of it, you'd better go rewrite the settlement. I'm not approving that paragraph.

MR. HOGAN: What I'm saying, Your Honor, is that we were approved for substantial contribution up to August 31st of 2008.

THE COURT: Right.

MR. HOGAN: And some of which, what has transpired with regard to negotiations on behalf of the Canadian Zonolite claimants, occurred post that.

THE COURT: I understand that.

MR. HOGAN: Okay.

THE COURT: And as to matters that --

MR. HOGAN: And we're not looking to open anything prior to that date.

THE COURT: Okay. As of anything that happened from September 1 of 2008, to the date the application for special counsel approval was filed, because I'm willing to make this application nunc pro tunc to that date, I think there's precedent for that.

MR. HOGAN: Okay.

THE COURT: And that was in December, I think, 2009.

MR. HOGAN: It was, Your Honor.

THE COURT: Okay. So, from September 1st of 2008, to December, whatever the date is, 2009, a substantial contribution award can be sought for any items that weren't already compensated by this Court.

MR. HOGAN: Of course.

THE COURT: I'm not going back and reopening the issue that it was already awarded, I'm not entering additional fees, that's over and done with, that's the end. So, from September 1st to December whatever, 2009, you can make a substantial contribution fee request.

As of the date that the application was filed, you're then into the fee management order that's approved in this case because you're now special counsel and I'm not going to be judging things by substantial contribution, I'm going to be looking at the fees as I do for everybody else's fees.

MR. HOGAN: Understood, Your Honor.

THE COURT: Is that acceptable? That's the question.

I don't think that's what this --

MR. HOGAN: Well, I've got to talk to my counsel and the import of your decision, Your Honor, is that it appears that the minutes are going to have to be revised, yet again.

MR. BERNICK: Can I make a suggestion?

THE COURT: Yes.

MR. BERNICK: Maybe they ought to confer and figure --

THE COURT: Yes.

MR. BERNICK: -- and see what really needs to be nailed down so we can get on with the next issue which is item seven.

THE COURT: Yes, I think it gets you to the same place, but I need to make sure that it doesn't violate the terms of the settlement.

MR. HOGAN: That's fine, Your Honor. The last point I wanted to make, just for the Court's edification, relates to paragraph 22. That's the paragraph that you were having some difficulty finding earlier, as it relates to the breakdown of how fees were going to be paid. Remember, you were looking for it?

THE COURT: Yes.

MR. HOGAN: It's paragraph 22 in the revised, restated minutes of settlement.

THE COURT: I did find it when Mr. Freedman was

speaking.

MR. HOGAN: Fine.

THE COURT: Thank you, Mr. Hogan.

MR. HOGAN: Thank you, Your Honor. We'll report back to the Court after we confer.

THE COURT: All right. Let me make one note. September 1st to -- is it December 21? I'm not sure I know the specific date.

MR. HOGAN: It is, Your Honor. December 21st.

THE COURT: Thank you.

MR. MONACO: Good morning, again, Your Honor.

THE COURT: Just a minute, Mr. Monaco.

MR. MONACO: I'm sorry.

(Pause)

THE COURT: Okay. Thank you.

MR. MONACO: Okay. Sorry, Your Honor. Again, for the record, Frank Monaco on behalf of the Crown. Your Honor, I have here with me today my co-counsel, Jacqueline Dais-Visca. I think Your Honor is familiar with Ms. Dais-Visca.

THE COURT: Yes.

MR. MONACO: She's appeared in front of the Court before. She would like to address the retention applications as well as the plan objections, which are the next item on the agenda.

THE COURT: Okay. Well, let's limit it, at the

moment, to the retention application.

MR. MONACO: Okay.

THE COURT: Okay. Thank you. Good morning.

MS. DAIS-VISCA: Good morning, Your Honor. It's Jacqueline Dais-Visca for the record.

Counsel have properly characterized how we're appearing today and the status of our objection to the extent that I want, just on the record, that the clarification that's now been provided as to the role of future claims representative counsel, that was one of the things that we were seeking clarification of. We support that clarification being made and that's before the Court, that concern, as far as the Crown is concerned is taken care of.

The second aspect was, we take no position on the case law governing the appointment of special counsel in these proceedings, but we do reserve our right for any future motion that will be brought for applying for fees for substantial contribution and we will renew our objections at that point. All this is against the backdrop that in Canada we have leave to appeal motion which is in the hands of the Ontario Court of Appeal. The court is going to deal with the leave to appeal from the approval of this restated minutes of settlement on February 19th, on an expedited basis. If leave is granted on that date, they will also hear the appeal. So, it's our submission to the Court that any decisions being made with

respect to approval of fees that relate back to those minutes that are the subject of the appeal, should await a determination by the Court of Appeal in Ontario which, hopefully, will be in and around February 19th. Thank you.

THE COURT: So, back to what Mr. Hogan was talking about, paragraph 22, that lays out how the PD claims fund would be allocated for fees for counsel, the Crown is still objecting or reserving an objection to that or only to the PI side?

MS. DAIS-VISCA: We haven't interpreted those minutes as being -- that the fees are only with respect to one aspect of the claim, PD or PI. The --

THE COURT: It says PD claims fund.

MS. DAIS-VISCA: Right. And in the settlement, in the minutes of settlement, they also purport to resolve treatment of Canadian PI claims and as you know, and that's one of the grounds that will be raised -- that has been raised in our objection to the modifications that are being sought to incorporate into the plan, this restated minutes of settlement, that they have done treatment to, they have negotiated treatment to PI claims as a part of both the first settlement and this settlement. What's notable about these restated minutes is, instead of releasing the Crown in respect of all liability, joint and several with Grace and just preserving several liability, they have inserted back in from liability for the Crown, joint and several in respect to the PI claims.

So, the minutes have been negotiated with the view to resolving all Canadian claims, and not just focused on the property damage claims.

So, I'm hearing, really, for the first time that the fees are being allocated specifically for work on the PD side. That's where the monies are flowing but I certainly haven't understood that those funds were being earmarked specifically for just PD work because throughout, they've been trying to resolve all Canadian ZAI claims.

THE COURT: Okay. Well, the document itself, I think is pretty clear, that it's resolving the PD fee issues because the caption is, use of funds in the Canadian ZAI PD claims funds, which clearly doesn't include payment for the PI ZAI Canadian claims and then it talks about how the fees will be awarded for past and future work and I don't think there's anything here that talks about fees for the PI, at least I don't recall it. If there is, somebody point it out to me. No.

MS. DAIS-VISCA: My understanding is, that the only fees are being paid out of the PD fund, but I haven't been interpreting that provision as being an allocation of fees on account of just the PD work that they've done. Their work throughout has been representing Canadian claimants on PI and ZAI.

THE COURT: Oh. Well, I wouldn't be able approve a

distribution for PI work out of the PD fund as the allocation under the plan as provided, I don't think. So, if the Crown has a different view, you're going to have to show me how.

My understanding of this settlement and the plan, in conjunction, is that this would resolve the property damage work, but not the PI work.

MS. DAIS-VISCA: Right. And I think when we get the actual application for payment of fees and they identify exactly how they're planning, or how they've earned these fees, I think we'll have more clarity, so we'll reserve any objections until we understand more fully what they're applying for, in what respect, for when that substantial contribution application comes forward.

THE COURT: Okay. Well, that gets back to my approval of the settlement because if the settlement is approved, I'm not going to get an application for fees on the property damage side, this approves it. And that's why I'm confused about the Crown's position.

MS. DAIS-VISCA: Well, the Crown's position is, simply put, and this morphs us now into, unfortunately, the objections to the plan proper and the Crown's position is, essentially, that the restated minutes are materially different than the original minutes, they have caused particular prejudice to the Crown, and as you will see from the notice of motion for leave that was appended to our materials, those are

-- the live issues for the Court of Appeal are whether or not the plan was capable of being approved, given our allegations of conflict of interest with representative counsel and our allegations about whether or not the requirements for approving in advance of plan confirmation, a material settlement, have met the requirements of Canadian law.

So, our issue throughout these proceedings and our concerns, and the genesis for our raising these objections, is the difference in treatment to the Crown and I'm happy to step back and if you want to proceed with the plan objection by the Crown, I'll defer to my friends and then just respond with two quick points on those issues, if you want.

THE COURT: All right. Well, I want to finish the fee issue first. Is there anyone else who wants to be heard on the fee issue?

MR. BERNICK: Your Honor, if we could just ask whether the Crown has an objection to the application with respect to counsel. We understand that they have an objection to the plan. By having heard all of what counsel has said, I didn't hear an objection to the appointment that's being sought in item five on the agenda, and six on the agenda.

THE COURT: I don't think there's an objection to the application. The issue with respect to the FCR clarification has resolved the Crown's objection to the application.

MS. DAIS-VISCA: Well, our objection to the

application was twofold. First, our concern about continued representation of the Crown's claims over in the proceedings against the trust. The Crown's claims over have now been channeled, whereas before they had all been released.

The other aspect of the claims -- the Crown's objection, was this issue of conflict of interest. Canadian case law, in the class action context teaches that you are in a conflict of interest if you, as counsel, tie the payment of your fee and make conditional settlement upon your being paid your fees or your clients get nothing, and the teachings of our Canadian courts is that is not something that's capable of approval by the court. And so, it's an issue that the Canadian Court of Appeal will be dealing with on the appeal and I'm sure my friends will have arguments to say that we're not tying our fees as a precondition to the payment, but it doesn't come clearly from the record or the reasons of Justice Morowitz, if that's the case.

So, in terms of can they -- are they in a conflict of interest when they say there's no deal for my clients unless I get exactly what I'm asking for, and usurping the Court's discretion on a particular fee application.

If that issue is being deferred to another day, those arguments do not need to be made here today. If there's going to be a separate application from them to come forward and demonstrate that they should be paid, if it's going to be dealt

with today as a part of the objection to the plan, then I'm not sure that I'm in any position to articulate anymore than it has already been provided in the papers and I would just ask the Court to defer any findings until the Court of Appeal in Canada has exhausted our appeal rights.

THE COURT: All right. Well, I guess the issue is, although this document says that the funds will be used to pay $2 million, do I get a fee application that will justify the payments of $2 million? If I do, it will defer the -- or resolve, I should say, the objection. If I don't, then --

MR. BERNICK: Your Honor, I think with respect to anything relating to the fees that will be sought, that is for another day, I think is what Your Honor has heard and if I'm wrong about that, I'm sure somebody will stand up and tell me. We're not -- I don't believe that there's any request for Your Honor to approve any fees going forward. The fee application will be made in whatever form is appropriate, and I guess there's going to be a request for a substantial contribution and there are going to be fee applications made in connection with the retention as a representative going -- special counsel representative going forward.

But I think it is important today, provided that we can get the applicant's counsel to caucus and then report back to the Court, that the Court resolve and, in our view, grant the motion for the appointment as special counsel. That is

something that should be decided today. And I've now heard the Crown indicate that there are certain objections that are being withdrawn. There are others that are being reserved, i.e., the allocation of fees and I think that that is properly reserved and the only objection that I've now heard as to the appointment itself, is that there's a conflict of interest, there's an ethical issue. And, I think that the simple answer with respect to that comes from counsel's own lips, which is that that is an issue that was specifically litigated in Canada.

Indeed, it is an issue that pertains to Canadian counsel, and whether they have a conflict of interest. It was disposed of at the trial court level, that argument was flatly and completely rejected. Apparently, the Crown intends to take an appeal of that. That's appropriate. But having decided to litigate that issue, in that forum, because it relates to the agreement for which they have sought approval in Canada, I think that they're bound by their choice. They can't litigate the issue both in Canada and here. They sought to get Canadian Court -- there was a request to get Canadian Court approval of the agreement, the minutes of agreement. That contemplated the very motion to appoint counsel that Your Honor has taken up today. Objections were made by the Crown at that time, based upon the alleged conflicts of interest. And once they made that objection, rather than asking that it be reserved for

determination here, in connection with this motion, they made a choice and they're collaterally estopped by virtue of whatever decision comes out of there.

Now, collateral estoppel doesn't set in until the matter is final. We now know that the matter is going to become final, sometime in the middle of February. But under any set of circumstances, we should not have litigation in this court over exactly the same issue. So, having heard that objection, I think that that object should be rejected on its face because they have made the choice and they continue to make the choice to pursue that issue in Canada.

THE COURT: Well, I think that's what the Canadian counsel is saying. They're asking you to do nothing until the Canadian Court determines whether the trial court in Canada was or wasn't correct, and if the trial court is correct, then there's no issue here. If the trial court wasn't correct, then there's a conflict and the question is, how can I appoint them as special counsel here, if there's a conflict.

MR. BERNICK: Well, because the fact of the matter is, that if, in fact, the Canadian Court reverses and says that there is a conflict, then the approval of the settlement itself is unwound and if the approval of the settlement itself it unwound, then people are going to have to report back to the Court on whether there's going to be some kind of new settlement or new arrangement, but with respect to the issue

that we now have, which is this settlement with this appointment, that matter -- the question about whether there is a conflict has been reserved to the Canadian Court. We're not asking that they waive their objection, what we're saying, the objection --

THE COURT: But, why am I approving a -- but why am I taking on a settlement that may be undone if there's a reversal? That really wastes court time. It wastes the Canadian Court Appeals time and it wastes mine, because if I approve it and the Canadian Court reverses, we've done a whole lot of work for nothing.

MR. BERNICK: That is, I'm sure, something we're going to get into in connection with the plan objection. But there's a little bit of a chicken and the egg. We have to go forward and get approval, or I shouldn't say we, it's important to go forward and get approval of the minutes of settlement that takes place in the Canadian Court, that is in process. At the same time, that settlement, as one of its terms, calls for the appointment of counsel through the motion that is taking place now.

It is true, Your Honor, that we could simply wait until all the dust has settled in the Canadian Court and take up incremental issues. But the fact of the matter is that because that settlement does call for this to take place, it was our judgment that because we're trying to move this case

forward, and get it done, that we would raise the motion at this point in time. The worst that can happen is that it becomes moot because the settlement is unwound by the Court of Appeals in Canada.

THE COURT: Well, the worse that can happen is I'll spend two hours listening to objections to the settlement and plan objections, based on the approval of that settlement, that will be reversed by one word in the Canadian Court. Now, that doesn't seem to me, to be a good use of anybody's time.

MR. BERNICK: Well, I'm -- one at a time, Your Honor. We've had the argument on the motion. I think that it has taken place, I think it's a fairly straightforward matter. If Your Honor wants and what maybe would be the most prudent thing to do, is to grant the motion but subject to the outcome of the appeal. That is as a condition subsequent.

But it is important for us to get this thing done, because the Canadian settlement is an important part of the overall confirmation process for this plan and there are many, many, many constituencies who are now, after many, many years, and we can have a discussion for another day about all the circumstances that led to that period of time, they are anxious to get this plan confirmed. Certainly, the debtor is and the debtor has got a lot of business reasons that are now important to all constituencies to get this plan confirmed. So, that anything that can be done and be done reasonably, without

actually waiting for the pen to strike the paper sometime later on in February, is time well spent. This is a small issue, we think it's been properly dealt with. We now hear where the Crown is. It doesn't seem to me that they have a substantive objection to the motion, they have an ethical issue that's now being raised in Canada.

With respect to the second issue, which is the plan confirmation, and I know that we're now -- that is the next item on the agenda, but that also is a very important process to get underway, notwithstanding the fact that, you know, maybe in two or three weeks lightening will strike and the Court of Appeals will reverse in Canada. And, the reason that that is so, is that there's no real incremental work at all that's required to address the one basic plan objection that is there, which is the same plan objection that's being made by the State of Montana through the same counsel, in the same court, on the basis of the same record.

So, all that we really have to do is to simply move forward by having that objection become on the same timetable, subject to the same basic process that's already occurred with respect to the State of Montana. It's nothing new. So, no one is asking that Your Honor roll up your sleeves and engage in any substantive work at this point. We've got an administrative matter, which is the appointment of counsel, and we have the plan objection which is really a question of

process, which is, are they, or are they not included in the same process that applies to everybody else. That's it.

And, given the fact that the trial court in Canada has come out not only with the order, but also with the endorsement. It has in very, very strong and unequivocal terms, said this agreement is fine and should go forward and is in the best interest of all concerned and has also resolved the issue that the Crown has made. And, I might say, Your Honor, the Crown has not been very prompt in this matter, as the District Court in Canada observed. That counsel has known about this matter -- and basically, this is the problem we've faced with Canada all along. It just takes time for the Crown to get things done.

I understand that, that's fine, but we've got a lot of other things that hinge upon getting this thing done promptly.

So, Your Honor, we would urge that Your Honor take up (a) grant the motion subject to a condition subsequent, which is that, obviously, this plan is still on appeal, the agreement is still on appeal, and with respect to the plan, which is item eight, I think it is on the agenda, that the State of Montana has already raised the issue, Your Honor, already is going to engage that issue and we should simply have -- and there's no evidence that's been identified. Remember, the Crown was supposed to identify any evidence in connection with the

submission that they made, that they would want to proffer. They've identified no such evidence. So, we have, essentially, an admission that this matter can be resolved on the basis of the same record, and we would ask that now having heard the objections, seen the briefs on the objections, the Court should simply consider those same objections as part of the plan confirmation process as Your Honor writes the order.

THE COURT: Okay. Mr. Hogan.

MR. HOGAN: Not to belabor the point any more, Your Honor, but I did hear one comment made earlier that I wanted to address for the Court and that relates to the $2 million. Again, we're on paragraph 22. And, I believe I heard the Court indicate that as to that $2 million, that there was going to need to be a fee application with regard to that.

That money is money that's being paid by the debtors to the PD Trust and immediately from the PD Trust, pursuant to the plan, to rep counsel. There wasn't ever contemplated, at least by rep counsel's perspective, that there be a fee application associated with that payment.

THE COURT: That's the problem, I think, that the Crown is addressing and also, perhaps, a problem for confirmation, if the Court hasn't approved all the fees that are to be paid to counsel anyway. So, that's my issue with this settlement. It provides for a fee, I have no -- I doubt very much, based on the fees that this Court has already

approved for other professionals, the $2 million won't be justified for the circumstances, nonetheless, I haven't seen the fee application and I don't know that for a fact. If, in fact, there's a conflict, that's a different issue.

So, you know --

MR. HOGAN: I understand, Your Honor, I do. I just -- I didn't want the Court to be left with an incorrect impression about what rep counsel's expectation is with regard to the minutes of settlement and their effectuation.

THE COURT: Yes. I didn't think, from reading this, that rep counsel thought they'd be filing a fee app, but I am questioning whether, maybe, I don't need one. If I need one in order to resolve this objection, get to confirmation and pass what I think is a pretty technical issue in this overall settlement, it may be worth it.

MR. HOGAN: Thank you, Your Honor.

THE COURT: Could you consult with your counsel?

MR. HOGAN: I was attempting to do so before, but there was argument still ongoing, Your Honor.

THE COURT: Okay.

MR. HOGAN: So, we'll undertake to do that once -- at least these matters are set aside for temporarily, so I can step outside.

THE COURT: All right. Sure.

MR. HOGAN: Thank you.

MS. DAIS-VISCA: I just want to clarify the Crown's appearance here today and our position. It is the Crown's position that it is premature to be dealing with either of these objections. My friends use the analogy of the chicken and the egg, my analogy is cart before the horse. And these aspects of the Canadian ZAI claimants was carved off to the Canadian courts to be resolved. We've got an expedited appeal. It's my position here that I'm urging this Court to await determination by that court. Either it will be -- the appeal will be upheld and then the approval of the settlement will be overturned, or it will be affirmed. And we should have that decision in fairly short order.

And I agree with my friend, it would be of no use to this Court's time for me to be up here, re-articulating the arguments that have already been made as to the particular treatment that the Crown's contribution indemnity claims will receive in the TDP. I would just draw Your Honor's attention to the fact that Justice Morowitz declined to look at all at how the Crown claims would be treated in the TDP and referred us to come to the U.S. Court to determine those issues, alongside all the other similarly. So, when he approved the settlement, he didn't even turn his mind to what the consequences for the Crown were. And that is one of the ground of appeal.

In terms of my friends' indication that the Crown has

not been prompt in this matter, I would like to please refer the Court to the transcript of the hearing of this Court, it was October 27, 2008, and this appears in the materials that we filed. The submissions by myself at that hearing are at Page 85 and this hearing was the report to the Court following the approval in Canada of the first settlement, the settlement that included a release against the Crown, in favor of the Crown for all Canadian claims for which they would have claims over against Grace.

And beginning at Line 19, on Page 85, I said the following: "The Crown filed an objection in these proceedings. Subsequent to filing that objection, Justice Morowitz of the Ontario Superior Court, acting under the CCAA, released his reasons for decision, as well as the order approving the Canadian settlement. In the context of his reasons, he did two things that are of import for the purposes of the outstanding objection from the Crown. At that time, we had filed an objection to the disclosure statement concerning contribution indemnity claims treatment. The first was, he approved the settlement and in so doing, he recognized that Canadian representative counsel have the authority to negotiate on behalf of the Crown, and the second thing he did was recognize the CCAA release in favor of the Crown, for any of the Crown claims seeking contribution indemnity from Grace. As a result of that, I said, our objection is effectively moot now. We are

no longer able to appear before you as we are now represented by Canadian representative counsel."

So, on the record, back in October of 2008, with all counsel for Grace and counsel -- CCAA rep counsel in attendance, we put on the record that our understanding was that we were no longer in a position to represent ourselves in these proceedings, that the Canadian court had ordered all representation had to be done by CCAA rep counsel.

So, to the extent that my friends are suggesting we should have, throughout, been continued to file objections and do whatever we could to preserve the Crown's interest in these proceedings, it's my submission that's without merit, given that they are, effectively estopped from asserting that position, given that nobody took a contrary position to our interpretation that we had no standing to do so.

THE COURT: Well, I've never been asked to address that issue, so it hasn't been -- I acknowledge that that statement was made, I don't know where it's coming from, based on the order that the judge entered in 2006, but I'm not familiar with the order that you're referring to in the statement that you made. So, if there is --

MS. DAIS-VISCA: It's the approval order form October 17, 2008 and it appears in the materials, and in his reasons he specifically finds, because our objection, we supported the settlement but we wanted clarification that we were still in a

position to defend our own interests in respect to the claims over because our claims over arise wholly from the claims of the other PI claimants. We're the defendant.

So, if they're successful, then suddenly we have claims. If they're unsuccessful, there was an irreparable conflict of interest, in our view. And Justice Morowitz disagreed and said that the original representation order authorized them to go ahead and represent the Crown, particularly in the first settlement because there was no prejudice to the Crown.

THE COURT: Right.

MS. DAID-VISCA: There was nothing left. But then he has now renewed that position when there's clear prejudice to the Crown and that's the basis in forming our objections going forward. So, as soon as we caught wind of this, we became active again and we have tried to accede to the Court's time lines to deliver these materials. So, we are trying not to delay things unnecessarily. And we've got the Canadian appeal expedited.

THE COURT: Okay. I think Mr. Bernick's suggestion that in the event that the issues I've raised on this record can be successfully resolved by the applicants, that approval of this application, with the condition that the appeal upholds the trial court's order in Canada, is probably the best way to go. Now, that's not an approval of the settlement, that's an

approval of the application of Canadian counsel, but I need to hear from them. So, Mr. Hogan, until you get back to me, I'm deferring this issue and moving onto something else.

MR. HOGAN: Thank you, Your Honor.

MR. BERNICK: Your Honor, with respect to the next -- we'll follow through on that. With respect to the next item, which is the treatment of the plan objections, I think that we've just now been talking about that. And I don't know if there's going to be any further argument from the Crown with respect to that. I see counsel kind of shaking her head, but if there's something else that you wanted to address --

MS. DAIS-VISCA: No. We will rest on our papers on the formal plan objections, and again, it's our position that a determination on those plan objections should await determination by the Court of Appeal. We have no further argument in that regard.

THE COURT: All right.

MR. BERNICK: Okay. And, I would only observe, there, that this is something which is like the application that Your Honor just heard, but it's an even stronger situation where Your Honor should, in fact, in our view, basically proceed.

Counsel is correct, as she observes, that the trial court in Canada did not take up the issue, did not take up the issue of the plan objections that they've made, which is that

they should not have -- they should have been able to get the same protection in the second, or amended agreement, that they got in the first. The trial court specifically carved that issue out and said it's Your Honor's issue, it's a plan confirmation issue. And therefore, by virtue of even the trial court's decision in Canada, that matter is ripe for Your Honor.

Now, of course, if, in fact, the Court of Appeals overturns the settlement itself, once, again, it's moot. But, clearly, this is not something that has vested in the Canadian court. The plan objection itself. That is that they should have the same treatment that they had the first time around. That is, in fact, before Your Honor. And as to the timeliness of counsel, you know, this is not a question of pointing fingers, but the timeliness of counsel in raising all of this, was specifically litigated by the Crown, and the trial court said, no. Basically said the reliance placed on the original settlement by the Crown, which is exactly what counsel has done again this morning, is to talk about the original settlement, was in my view, unreasonable in the circumstances and does not alter the fact that the merits of the amended plan should be considered in light of the reality that the original settlement no longer exists. As all parties involved were all sophisticated and they knew the consequences of failure to obtain the U.S. confirmation order by October 31, 2009.

Your Honor doesn't need to reach that issue, but it

is a backdrop for the fact that we're here, we're now -- we've got an issue that's ripe and we think that Your Honor should proceed and if, in fact, we learn in the next few weeks that the Court of Appeals is reversing in Canada, obviously, we'll have work to do. But, we believe -- we agree with counsel for the Crown that the matter is on the papers and can be taken up by the Court.

MS. DAIS-VISCA: Thank you. The only wrinkle to add to what my friend has just stated, is that the treatment of the Canadian contribution indemnity claims over, once we hit the fund is the same treatment that anybody else is receiving in the U.S., and so, our plan objections line up with Garlock and Montana's and other objectors.

The different treatment that we have as a result of the Canadian settlement is that unlike PI ZAI claimants in the U.S., Canadian ZAI PI claimants have provided a release to Grace. To my friend -- and his material has commented on the gratuitous gift to the Crown of having provided a release. In this new restated settlement, it's the Crown's position that the CCAA rep counsel gave a gratuitous gift to Grace in giving a release in respect of all the claims against them in Canada, leaving Canada to hold the bag for all joint and several liability, which is a condition that is not currently in play for any of the similarly situated claimants in the U.S. And there was no additional consideration for that. It was just

given. And the mechanism then is that they can sue the Crown in Canada for all joint and several liability, and leave Canada holding the bag and going down for a claim against the fund. And that's the differential treatment that we're saying to the Court of Appeal, that Justice Morowitz had to consider as a relevant factor before approving that and the settlement is fair and reasonable, because that is different treatment for Canadian PI claimants that adversely affects the Crown.

THE COURT: The U.S. ZAI claims are providing -- are you talking of personal injury? You're talking personal injury.

MS. DAIS-VISCA: Personal injury, right.

THE COURT: Okay. The U.S. ZAI claims provide a release to the debtor when they're paid through the trust.

MS. DAIS-VISCA: Right.

THE COURT: Yes.

MS. DAIS-VISCA: The different mechanism in Canada is that the Canadian ZAI plaintiffs don't even have to come to the fund, they just sue Canada and Canada has to come down and as a contribution indemnity claimant, receive, as BNSF has submitted, just pennies on the dollar from the amount they pay out on account of Grace's several liability. So, we won't be defending just our own liability, we'll have to approve payment of Grace's liability, they release Grace, so they won't even come to the trust, Canada is left holding the bag and

effectively indemnifying Grace for all their liability in Canada.

THE COURT: They're releasing the debtor without making a claim against the fund.

MS. DAIS-VISCA: They released the debtor of all claims in Canada and they've channeled the Crown contribution indemnity claim.

MR. BERNICK: With all due respect, that is -- the fact that the Crown is a joint tortfeasor, may even be a sole tortfeasor, because of its sovereign obligations as Your Honor has indicated with respect to Montana. The fact that they're exposed to claims in the tort system, then have to come down, as counsel indicates, to make claims against the trust, means that they're in an absolutely identical condition as everybody else in the tort system who is a joint tortfeasor.

They apparently -- what they're really taking issue with is that the ZAI personal injury claimants have decided that they're not going to go ahead and sue Grace. Well, that's their decision, but the Crown has no right that arises by virtue of the ZAI claimants' decision not to pursue claims against Grace, but to resolve them, the Crown has no right that arises by virtue of that, to somehow get protection, or different treatment, of their contribution claims than any other joint tortfeasor anywhere who has contribution claims.

In other words, the Crown is saying that because the

ZAI personal injury claimants have decided not to go after Grace, that they should get the benefit that accrues to that in some fashion and should not have to be sued themselves, or that their contribution claims should be treated differently, but they have no right that arises by virtue of the decision by ZAI personal injury claimants not to pursue Grace.

MR. FREEDMAN: But, Your Honor, to be fair, what they agreed to is what all the other PI claimants have agreed to, namely, be channeled to the trust, as opposed to Grace. In that sense, they're not suing Grace, they're going against the trust, but there's no waiver of their claims in this deal at all. They're going to go to the trust like all of the ZAI -- like all of the personal injury claimants related to Grace asbestos.

THE COURT: All right. So, the issue isn't that they've agreed not to sue the debtor and not to present claims to the trust --

MR. FREEDMAN: Right.

THE COURT: -- it's that they're not suing the debtor because they can present claims to the trust.

MR. BERNICK: And the question then is, does that give rise to a right in the Crown to get some special treatment vis-a-vis its liability to the personal injury claimants or its ability to claim against Grace.

THE COURT: But that's not what I'm hearing the Crown

arguing. What I'm hearing the Crown arguing is that the Canadian ZAI PI claims have agreed not to present claims to the trust, but only to sue Canada and let Canada present the claims to the trust for contribution and indemnity.

MR. FREEDMAN: Your Honor, paragraph 13 of the agreement, the last sentence --

THE COURT: Of the settlement?

MR. FREEDMAN: Of the settlement agreement. Canadian ZAI PI claimants shall be entitled to the same rights as all other asbestos PI claimants.

THE COURT: Okay. So, they can present their claim to the trust, they haven't waived that issue.

MR. FREEDMAN: Right.

MR. BERNICK: Right.

THE COURT: I think that must be -- what you've just argued, I think, is a misreading of this language. The Canadian ZAI personal injury claims still will go against the trust if they choose to do it. They have not waived that ability, and yes, if they have some right to sue the Crown as a co-defendant in the tort system, just like if they have that right to sue any other co-defendant in the tort system, that's preserved, I'm not sure where there's -- I'm missing the issue.

MS. DAIS-VISCA: Yes. Right, well, the mechanism -- the way it will play out, and the Crown's interpretation of this is that they will pursue their claims against Crown

without naming Grace in Canada, get the full payout from the Crown in Canada and never have to pursue the trust because it will have been paid in full for the joint and several liability of Grace to their action against the Crown alone and the Crown is incapable of going to the TDP as a contribution indemnity claimant until all the 11 class actions are resolved in Canada.

THE COURT: Well, you wouldn't have a claim until then. A claim that could be paid until then.

MS. DAIS-VISCA: That's right. Right. And, we will be defending these actions without any procedural orders in order to get Grace's evidence in respect of the product.

THE COURT: Oh, well, the procedural order discovery issue is a whole different issue. You're entitled to get whatever discovery from any party, just because Grace isn't a party doesn't mean you don't have discovery from Grace.

MS. DAIS-VISCA: Right. And this is part of the case law for the Court of Appeal on how we treat procedural orders and in approving class settlements and they're usually a form of one of the terms of the settlement includes procedural protections for the non-settling defendants and that's not a part of this settlement.

THE COURT: All right.

MR. BERNICK: (a) there's no difference -- we now know that there's no difference between the Crown's position under the joint tortfeasor, such as the State of Montana. It's

just remarkable to me that all of these same arguments are being made in Canada, they're going to be resolved in Canada, and collateral estoppel somehow is not going to set in and we're going to re-litigate them here.

THE COURT: Well, I don't know how the Canadian court is going to either approve or not approve this plan.

MR. BERNICK: Well, it's in connection with the settlement. They're making exactly the same arguments against the settlement that they now want to come back and say well, it's not fair in the settlement, they get turned down on that. Then they say it's not fair in the plan. Again, I don't think that there's any merit to their plan arguments, for the same reasons that have been indicated which is they're no differently situated than the State of Montana.

But be that as it -- and maybe I should just rest there. It is not a novel argument.

MS. DAIS-VISCA: And, I'll just, for clarification, we do not intend to re-litigate all these issues. Whatever decision the Court of Appeal makes on the fairness and reasonableness of this plan and its approval -- sorry, of the settlement and its approval in Canada, the only arguments I see that we'll have remaining will be the same arguments as the Garlock and the BNSF and we will rest on our papers for that.

Our fight, we agree, is in Canada, that's why we came here today to say, please defer, please adjourn, whatever,

until the Canadian courts have exhausted our appeal rights. We'll be bound by that decision, we don't plan to come back and re-litigate those issues here.

MR. BERNICK: And so, Your Honor, I'm told by Canadian counsel that although the Court of Appeals may hear this matter promptly, it may not be an immediate decision, which then, again, I understand, it means that it is particularly on matters that are carved out by the Canadian proceeding for resolution here, i.e., the plan, Your Honor should then just proceed with those because they are before Your Honor in the first instance.

THE COURT: Well, I think I can go forward with the plan. The only problem is, what happens in the event that I approve the plan and then the Canadian court says, oh, no, the settlement is reversed? What have I done?

MR. BERNICK: Yes. Well, first of all, you've approved the plan, so that in the event that the Canadian court says it's okay, we can, in fact, go forward and get out of bankruptcy and we don't have to wait for the Canadian court, in order to even begin this process. That's basically the idea, is to get it out of the way now.

If, in fact, the Canadian court is still considering this matter, can the plan go effective, that there may be an issue there. Again --

MR. FREEDMAN: There is an issue, Your Honor,

because of the condition of the effective date of the plan. That we have an order in Canada implementing the 524(g) injunction, which could not happen if this matter was reversed in the Canadian court. So, precisely, as Mr. Bernick is saying, it makes sense to move forward on all of the plan confirmation issues and let that get resolved. We will still need to resolve matters in Canada to go effective, but the process will have moved that much farther down the road.

THE COURT: Well, maybe. I mean, if I have a plan confirmation order and the plan can't go effective, then the plan has to be at least modified, if not withdrawn, and who knows what the consequence of that is going to be. And, folks, this is one complicated case. I really don't want to get into this and then find out that because I've approved something, another court that has more slashes after its name than I have, decides that I can't have approved it, that I have to redo it all. It doesn't make sense to me.

MR. BERNICK: Well, we would agree with that and all that we can deal with is where we are today, which is that thus far, the Canadian courts have squarely come out in favor of this arrangement. We do have a prompt hearing and I think all that we can do is to get things done.

Now, to say -- it's not to say that there aren't efforts to expedite the resolution of this particular issue and there are discussions that are taking place and we're anxious

to see if we can't obviate that. And I think that Your Honor, we understand what Your Honor is saying about the need to reduce the burden of this case and focus the issues that is taking place and I have some happy news to report in just a moment, but another issue has been --

THE COURT: That might be good, because so far it hasn't been really positive today.

MR. BERNICK: Well, I know and we're sensitive to that.

THE COURT: Okay. Well, to the extent that the issue is, essentially, the same between the Crown and Montana and the other indirect claimants, I think that, in fact, the issue really is, the legal issue really is stated pretty much the same way by those parties. And I am going to undertake that issue with respect to parties other than the Crown, anyway, so I'm not so sure that there's going to be a different ruling. It seems to me that the classification issues and the fair and equitable treatment issues and the absolute priority issues and the other things that the parties have raised are all the same. So, I think the ruling is going to end up the same, unless there's something peculiar about Canadian law that would separate the Crown out and I really don't think the papers have articulated that. So, let me just ask, is there something that I need to focus on that's different?

MS. DAIS-VISCA: No. The Crown's position is that we

will be treated in accordance with whatever ruling you make in respect to the other contribution indemnity claimants and their objections. We make no new arguments on that.

THE COURT: All right. So, I think the issue with respect to number six, is that the Canadian --

MS. DAIS-VISCA: Number seven.

THE COURT: Seven. One minute.

MR. BERNICK: The objection is seven. The plan objection is seven. Five and six are the retention matters.

THE COURT: Okay. One second. Let me correct my note here, please.

(Pause)

THE COURT: All right. I think with -- the outcome with respect to item seven is, it's simply part of the plan confirmation process and probably by the time I get an order out with respect to this, those rulings will have come down from the Canadian Appeals Court anyway. So, frankly, I'm not going to worry too much about when I can adjudicate it because I can put this last on the list, then it will still take me a while to get there. Mr. Hogan?

MR. HOGAN: I just wanted to have a word with Mr. Bernick. I didn't want to offend Your Honor.

THE COURT: All right.

MR. BERNICK: In fact, while that's happening, we can take up -- I think item eight is going to be very quick and

then we have a short report and then we have lenders.

MS. BAER: Your Honor, I apologize to the Reed Smith folks who may or may not still be on the phone. Item number eight, Your Honor, was a status on those two Canadian property damage claims that were remanded back from the district court and I know that Mr. Speights' firm and the Reed Smith firm have been working on a pretrial statement to submit to the Court. That's the matter that's then going to be tried on issues with respect to statute of limitations.

I did not receive anything from them, I don't know if they're still on the phone, but I do know they're working on that.

MR. RESTIVO: Jim Restivo, Your Honor. I am still on the phone. We do have -- we did confer and consult with Mr. Speights. We do have a joint pretrial statement that both sides have signed off on, that's very short, looks to be three, four pages. We do not believe there will be any witnesses at the trial of this matter. We believe there will only be two exhibits, the two claim forms and supplemental data to the claim forms. We don't believe we need to call anyone to authenticate this, so I don't think there will be any witnesses.

Our estimate is, we need about a half hour to put into evidence the two exhibits and to make -- both sides make their argument and we will be filing the joint pretrial,

probably today or tomorrow.

THE COURT: Okay. With respect to -- you're telling me you need a half an hour for the entire proceeding?

MR. RESTIVO: Yes, Your Honor. You remember, this is bifurcated and at this point, what we are trying is only the liability question of the ultimate statute of limitations.

THE COURT: Yes. Is it possible to do it on one of the omnibus hearing dates, after the conclusion of the Grace matters that day then?

MR. RESTIVO: I believe it is, Your Honor. I believe Mr. Speights is available both for the February 22nd and March 22nd omnibus, but I'm in trial in Tampa Federal Court in February, that week. And so, our request would be, if the Court has the time, a half hour at the March 22 omnibus.

THE COURT: I think that makes sense, Ms. Baer. Do you know what will be on that agenda yet?

MS. BAER: Your Honor, we're actually hoping to keep that very light. Some of us may be on spring break. So, I think that's fine. We have a lot up in February.

THE COURT: Okay. I think doing it at the March 22nd date is fine, Mr. Restivo, but I'd like to get that pretrial order filed so that I can get that entered before the trial.

MR. RESTIVO: The joint pretrial statement, Your Honor, again, will be filed either today or in the morning.

THE COURT: Okay. I believe that March hearing is

here in Delaware, correct?

MR. BAER: Yes, yes, it is.

THE COURT: All right. So, that will be in Delaware, Mr. Restivo.

MR. RESTIVO: Okay. Thank you, Your Honor.

THE COURT: And I guess I'll reserve an hour just in case that's necessary, at the end of the omnibus hearing.

I don't think Mr. Speights was on the phone. Is anybody on for the --

MR. SPEIGHTS: Your Honor, I'm on the phone. Can you hear me?

THE COURT: Oh, yes, sir. I'm sorry. Is this agreeable --

MR. SPEIGHTS: And, I agree with everything Mr. Restivo said and March suits me fine.

THE COURT: All right, that's fine. I'll get the order when I -- or I'll sign the order when I get it from you and we'll do the trial in March then.

MS. BAER: Thank you, Your Honor.

MR. SPEIGHTS: Thank you, Your Honor.

THE COURT: Thank you.

MR. BERNICK: There are two other matters I'd like to report on to the Court.

THE COURT: Mr. Bernick, just give me one second while I finish this.

MR. BERNICK: I'm sorry, sure.

(Pause)

THE COURT: Mr. Speights, could you mute your line, please? We're hearing your conversation.

Okay, Mr. Bernick, thank you.

MR. BERNICK: I have two matters to report on before, I think the last item on the agenda is the lenders, the default interest rate issue, or post petition interest rate issue, and then we're going to have continued argument on that. But the two miscellaneous matters that will be of interest to other people in the court, or may not be of interest, as the case may be.

First of all, with respect to Morgan Stanley, we do have a settlement with Morgan Stanley, with respect to their post petition interest issue. Essentially, they'll be paid the same interest rate that is provided for in the plan, with respect to prepetition bank lenders. So, they're agreeable to that rate and that will resolve the matter with Morgan Stanley.

As to one other miscellaneous matter that I wanted to make sure was flagged, in connection with, or at the time of the omnibus hearing on February 22, Your Honor will take up a joint motion by the plan proponents, for entry of an order approving a stipulation and an agreed order resolving neutrality objections with respect to the plan. So, we do have the language of that resolved and we want to present that for

approval by the Court.

During the course of discussing and, indeed, litigating some other issues, it has occurred to the plan proponents that it's really pretty critical to make clear one of the provisions, and we wanted to do that on the record today and it's very, very brief.

There is a retention of rights by the insurers in connection with this stipulation. And that retention of rights says that -- it's at Romanette -- stipulation paragraph 10(b), which deals with insurer plan objections, Romanette I, says "The following Phase 1 and Phase 2 objections are not being withdrawn by the insurers and the insurers retain their right to continue to litigate these objections before the court and the district court and in any appellate court and sub (a) is, each insurer retains the right to litigate the issues below, as applicable to itself."

Now, the reason for my standing up is that we want to make sure that when the stipulation refers to as applicable to itself, the intendment is to reflect the agreement among the plan proponents and we believe with the carriers, that that provision simply preserves objections, the objections to the extent that they fall within the scope of this provision, to the extent that those objections were timely made. That is, that the intendment is not in some fashion to have objections that would otherwise fall within the scope of what follows in

this provision, spring back to life if they were not timely made.

So, it's objections that have been timely made and otherwise fall within the scope of the language of the stipulation. That's what, as applicable to them means. And we wanted to state that on the record that to the extent that people have issues about that or questions, they should contact us in advance of the omnibus, but we wanted to make sure that that was stated on the record.

THE COURT: Okay. I'm not sure most of the insurers are represented, so you may have to get in touch with the insurers somehow to make sure that they understand it, because to the extent they don't either participate today or get a transcript, they're not going to hear that.

MR. BERNICK: I understand that and we will circulate the transcript. I note that at least some of the major players are here today, but we understand that, Your Honor.

THE COURT: All right.

MR. BERNICK: And with that, we're done with, at least from the debtor's points of view, we're done with the agenda, with the exception of the lenders' issue. I don't know if Your Honor wants to take a break before that argument starts or whether we should just start in with it.

THE COURT: Well, I do want to take a break, but has the issue with respect to items five and six been resolved yet?

MR. BERNICK: I think that they're out there now conferring.

THE COURT: All right. Then let's take a ten minutes recess and we'll reconvene. Thank you.

(Recess)

COURT CLERK: All rise.

THE COURT: Please be seated. Just a second, Mr. Hogan. I asked Mr. Hogan to wait a minute until I get to where I need to be on my proceeding memo here. Okay.

MR. HOGAN: Thank you, Your Honor. Daniel Hogan, again, on behalf of the Canadian Zonolite claimants and representative counsel.

Your Honor, we've been asked to consider the Court's recommendations with how to pursue our applications and we've had discussions with debtors' counsel, as well as with the Crown, towards fashioning a form of order. And, it may be possible that we can do that, Your Honor, but we want to explore a couple issues and some discussions that we've had and in light of that, Your Honor, I would ask that we adjourn this over to the 16th of February and to the extent that we can arrive at a form of order in the pendency of time between now and then, we file it under certification of counsel. But I'd ask that they be just moved over to the 16th for the purposes of allowing us to explore those options.

THE COURT: All right. Anybody object?

(No audible response)

THE COURT: Okay. It's continued till the February omnibus then. Thank you.

MR. BERNICK: It will be items -- Your Honor, items five and six.

THE COURT: Yes. Thank you.

MR. BERNICK: Thank you.

MR. HOGAN: Thank you.

THE COURT: Okay. Is there anything else before I get to the argument on the interest issue?

(No audible response)

THE COURT: Okay. Mr. Pasquale?

MR. PASQUALE: Thank you, Your Honor. Ken Pasquale from Strook for the Creditors' Committee.

Your Honor, Mr. Cobb for the lenders and I are going to break this up, we're not going to repeat things. I'm going to focus on what is now a purely legal issue and that's solvency. As to the other issues, obviously, I join in what Mr. Cobb will say and rest on our briefs and I'll just reserve some time to respond to what Mr. Bernick may say.

Your Honor, some time ago we, you know -- these issues have been before the Court for a while, as you know, and some months ago, we stood -- I stood here and we talked about solvency and what might or might not have to be proven at the confirmation hearing. And I stood here and said, a bit

flabbergasted, why are we doing this, this doesn't seem to be an issue that should be factually disputed. And as we stand here now, after the proof being presented at the confirmation hearing, briefs being done post hearing, Mr. Bernick doing his opening argument on these issues, that's exactly where we are. It's purely a legal issue. So, let me try to narrow and discuss where we are.

There is now no dispute that the test date is the effective date. It's in Grace's briefs, Mr. Bernick said it during his opening, which makes perfect sense because unlike the fraudulent transfer context, when we talk about solvency, where it's very clear the transfer date is going to be the test date. We're here on a confirmation standard of 1129(b), talking about the fair and equitable test. And, again, Mr. Cobb will focus more on the details of that, but just focus on solvency.

The Court is now addressing confirmation of the plan. And in addressing confirmation of the plan, you need to look at the plan and you need to look at the terms of the plan. And that's the remaining legal issue that's now before the Court. So, we know we're going to look at the plan -- well, let me back up.

We know we're going to look at the test date for purposes of solvency as of the effective date and now the question is, for purposes of solvency, should the Court

consider the terms of that plan.

Grace hasn't come forth with a single case that says you should ignore the terms of the plan as of that date. They've pieced together some code provisions but they have no case that says that.

And, Your Honor, if you think about what an effective date is, the effective date defines itself with the term, it's the effectiveness of the plan and I can show you, and maybe I will put it up on the ELMO.

On the very bottom of the page is this plan's definition of effective date, no surprise. It talks about the effectiveness of the Plan, capital P, which means the terms of this plan.

We've heard Mr. Bernick say that, well, here you can't determine solvency as of the effective date, because the asbestos liabilities will never be resolved. Well, that's just not true. The plan purports to resolve the asbestos liabilities. There is a deal and the asbestos constituencies have accepted contribution to the trust under the terms now provided in the plan, but importantly, through a settlement reached prior to the plan.

But to say that those issues -- excuse me, that those claims, those liabilities, are not resolved, is just not right. And, in fact, Grace's own expert admitted at the trial that they would be resolved.

This is Ms. Zilly's testimony, she was asked a question and Mr. Bernick wanted to clarify that we were talking about the plan before the Court and you see the colloquy above and we're talking about when the plan goes effective, Mr. Cobb said yes, and Ms. Zilly said, "If the amended plan is confirmed by the Court, and goes effective, then I believe that pursuant to the settlement set forth in the plan, that relates to the amount of assets that Grace and others will contribute to the PI trust, then the asbestos claims will be resolved."

Again, we all know as a matter of law, if the Court confirms the plan, that's going to be the effect. The claims are resolved. Asbestos claimants will not be able to pursue Grace for those claims. It's done, it's over. Their rights are against the trust.

And, so, hello, again, as we now stand here, it seems to have been unnecessary, our expert, Mr. Frezza, did an analysis, which is really undisputed now. I mean, Grace has never disputed the numbers and the approach and we'll talk about the feasibility issue in a moment.

Looking at the numbers and the resolution of the PI claims taken from the plan, those are the numbers we have to look at for purposes of confirmation. But to put this issue in, I think, in the most illustrative light, how can we ignore what's now before the Court? It's simply a matter of process now that Grace is able to argue, these claims aren't resolved.

Because, Your Honor, as we know, these claims were resolved in early 2008, and a term sheet was agreed to in April, and it's at least conceivable that a 9019 settlement motion could have been brought in May or June, in advance of a plan.

Parties would have come in, we could have said here are the terms, this is what we want to do and, yes, it'll be subject to a plan later. Sounds similar to the Sealed Air and Fresenius transactions which Mr. Bernick has now said, res judicata. But let's assume that that happened, Your Honor, and I don't want to get caught up into, well, there's reasons we couldn't do it that way, that's not my point. My point is, had it been done earlier, preplan, and the Court entered an order approving the settlement of the asbestos claims they would have been resolved before the plan, and we wouldn't be having this argument today about can we determine solvency under the plan? Just by process.

The numbers are the same, everything is the same. It's just a matter of when, in what format is this settlement taking place. The mere fact that it's taking place in a plan can't change the analysis of whether or not this is a solvent debtor case.

Your Honor, I mentioned a moment ago that Grace, in its briefing and in Mr. Bernick's argument, didn't have a single case that said, look at solvency for purposes of post petition interest, as of the effective date of a plan, but

ignore the plan terms.

Well, there is a case right on point, Your Honor, and it's a case both sides have cited and that's the Coram Healthcare case, 315 B.R. 321, decided by Judge Walrath in this court. And there were a lot of things going on in the Coram case, Your Honor, but it was a case very similar to this case. It was a post petition interest case. And one of the things Judge Walrath had to decide was whether it was a solvent debtor case.

I'd like to just take a minute and talk about Coram, because I think it puts to rest the debtors' argument that this Court should be ignoring the terms of the plan and ignoring the asbestos personal injury settlement.

Coram involved a couple of competing plans. There was a plan advanced by the Chapter 11 Trustee with unsecured noteholders and a separate plan advanced by the Equity Committee.

For purposes of determining the confirmability of the trustee's plan, that plan provided for a settlement with the debtor's noteholders and the estate had some significant claims against the noteholders, by which the noteholders contributed $56 million to the estate, they released the remaining $9 million due on their claims and that was in exchange for a release of the estates' claims against them and 100 percent of the equity in the reorganized entity.

Old Equity received a recovery under that plan. They received cash. In determining -- in making the determination, excuse me, on whether or not the unsecured creditors would be entitled to post petition interest under 1129(b), the fair and equitable test, the court engaged in all of the wonderful confirmation exercises that Your Honor has to do, including a contested valuation.

And expert testimony was presented on the going concern value of those estates. And then of particular interest here, the Court did an analysis of what it titled confirmation value and that begins on Page 341 of the decision.

In discussing the confirmation value, Your Honor, Judge Walrath took into account elements of the plan before the court, including a calculation of NOLs, net operating losses and most importantly for us as we stand here today, took into account the value of the noteholders' settlement with the estate and the court said this is something, this is a value that the noteholders who are -- will end up being the owners of this company are getting and when I determine confirmation value, the $56 million has to be taken into account.

This is from Page 343 of the -- I'm sorry, I realized I wasn't by the mic. This is Page 343 of the decision and in the highlighted portion at the top, the Court takes into account as I just said, the $56 million that the noteholders would pay for a release. And then in the lower portion that

I've highlighted for the convenience of the Court, the Court says, after considering the competing valuations, the competing incentives of the parties, and the divergent evidence offered in support of the valuations, we conclude the value of the debtors is less than 317 million. In and of itself, that doesn't tell us anything, but I wanted to raise the foundation for the next portion of the decision, which is on Page 345.

And this is where the Coram court turns to the post petition interest issue itself. And in the left hand column, the court specifically holds and finds that unsecured creditors can receive post petition interest. I'm going to paraphrase, Your Honor, insolvent debtor cases and the court cites cases, and then most importantly, up on the upper right, the court finds in this case -- well, sorry, Your Honor, let me go back a step. The court first -- an argument was presented that the court should look at the liquidation value and compare the liquidation value of the estate to the liabilities and Judge Walrath said, no. We're going to look at the confirmation value, because it's a confirmation test and that's what the noteholders are getting under the plan, under the terms of the plan before the court. And the court then finds, "In this case, though, it is relevant to compare the amount of debt to the confirmation value, 317 million, because the debtors are reorganizing instead of liquidating. Under that scenario, the debtors are solvent and post petition interest should be paid

before shareholders get a distribution."

Your Honor, it's our position that this resolves the issue now before this Court.

THE COURT: But, no one is disputing that there should be post petition interest. The issue is, what kind.

MR. PASQUALE: Yes, Your Honor, and that's -- and as to rate, Mr. Cobb will discuss that, it is disputed. Mr. Bernick and Grace are disputing that the terms of the plan should be considered in the solvency analysis. And all I'm trying to address for the Court is that this is a solvent debtor case. We've proved it, the plan proves it, the plan terms need to be taken into account. And that's what Coram supports, Your Honor.

THE COURT: Okay. Well, the debtors' evidence, as I recall, was that if the plan goes effective, then the debtors are solvent, they will be able to pay their bills as the bills come due, if you want to use that test of solvency, they will have access to capital to the extent that debts have to be paid in the future and that that access to the markets will provide them with the necessary capital to pay debts that will accrue in the future, including those to the asbestos committee. That's how I -- at least, what I recall the basic evidence to be, but the issue still is that the plan has to go effective to make all that happen. And, I don't understand why, even if I'm looking at a confirmation value, a term, frankly, which is, I

think, undefined except in Coram Healthcare, although having said that, I recognize that the purpose for valuation means that the Court can consider all sort of things in determining value because you have to look at the particular purpose in mind. Okay.

Aside from that, if I look at whatever this confirmation value is, that still assumes that the plan has gone effective. And, generally speaking, the Court isn't involved in post effective matters, the Court is involved in pre-effective matters, and so, there is a split second at which those two come together, I don't know how you judge when that split second actually happens, but it seems to me there is a significant difference in valuation before that split second and after that split second. So --

MR. PASQUALE: Well -- sorry.

THE COURT: -- I think what you're saying is, Coram says that the confirmation value is post effective, but the liabilities, somehow or other, are pre-effective.

MR. PASQUALE: No. No, Your Honor. What Coram does is take the plan and apply the terms of the plan, liabilities and confirmation value --

THE COURT: All right.

MR. PASQUALE: -- and concludes, this is a solvent debtor case. That's the language that I've highlighted on the right. And that's the point I'm trying to make to the Court.

It's a solvent debtor case. This, too, is a solvent debtor case.

There are, frankly, Your Honor, other issues that Mr. Cobb will address and we've briefed, that go to the issues Your Honor is raising now. I'm trying to focus on the very narrow issue of that threshold inquiry, is this, this, the Grace case, a solvent debtor case. Coram supports the argument that we've made which is that the terms of the plan which, of course, assume effectiveness, I agree, Your Honor, but that the terms of the plan get applied in determining whether it is a solvent debtor case for 1129(b). That's the point I'm raising, Your Honor.

THE COURT: Okay. 1129(b) is a confirmation standard. The Court has to make a determination that the case isn't likely to be followed by additional reorganization or liquidation. And, so, in that respect, yes, I think you do have to look a whether or not the plan, and I'll use the word feasible, is feasible for that purpose. But, that's a different issue from whether or not the debtor, because we're not talking about the reorganized debtor, we're talking about the debtor, is solvent. And I don't know how you do a post effective date when there is no debtor anymore, it's a reorganized debtor, and apply solvency nunc pro tunc. It's kind of like, you know, filing your application backwards.

MR. PASQUALE: That's not our position, Your Honor.

And, again, the debtors have agreed, look at the effective date, right?

THE COURT: Well, but the effective date has multiple meanings, that's what I was trying to say about that split second.

MR. PASQUALE: Understood, Your Honor.

THE COURT: Okay.

MR. PASQUALE: And, our position is, the effective date means nothing if it doesn't mean, include the terms of the plan in analyzing solvency.

THE COURT: But, doesn't the statute talk about the debtor? I mean, aren't we talking about the solvency of the debtor?

MR. PASQUALE: Yes, Your Honor.

THE COURT: Okay. If we are, then how do I do anything post effective date, because I don't have a debtor anymore, I have a reorganized debtor and they are not the same. The one thing that the Third Circuit is clear about is, they are not the same.

MR. PASQUALE: Agreed. But it's not post, it's as of. It's that moment in time, Your Honor, not before not after, of.

THE COURT: But, as of, that was the issue that I was trying to address. As of, I can't take something that happens after that split second, and apply it beforehand, just like I

can't take what happens before and apply it later. It's like mixing apples and oranges in the same bucket.

MR. PASQUALE: Well, again, Your Honor, understood, Your Honor. Again, that's what I tried to make the point earlier, that we're falling into this trap, frankly, of thinking about, well, because the settlement of the asbestos claims is raised in the plan, you can't look at that. You can't look at that for determining insolvency. And that just can't be right. And I used the example earlier that this, you know, if this was a 9019 earlier, these liabilities would be decided. And then what, Your Honor, do you have to go before that date? When do you test -- you just get down the slippery slope that makes no sense under the confirmation standards, which we're not arguing is inapplicable. Certainly, 1129 is applicable and the threshold, in all of the cases that we rely on, is only in a solvent debtor case.

THE COURT: But I think this is the issue. Let me assume, for purposes of this discussion, that the appropriate way to look at the asbestos personal injury liability is to take the number that's in the plan, that the parties have essentially agreed on is the settlement value. All right. So, I have that number.

The problem is that pre-effective date, I may still have that number, but I don't know how it's going to be paid? Post effective date, yes, there is a methodology in the plan to

figure out how it will be paid and that's the feasibility analysis. And I think everybody has agreed that -- well, no, I don't know if everybody has agreed, but on the plan proponents' side, I think everybody has agreed that if the plan goes effective, the debtor can meet the terms of the plan, that it is feasible, but that doesn't mean that without that second piece having been finalized, that the debtor is solvent.

Even if I take the asbestos liabilities that exist, and that the plan projects, I still don't know how, without the plan and the funding in the plan, they're going to be paid and whether the debtors' assets are sufficient to pay them. And I think that's the issue that has to be looked at.

MR. PASQUALE: Well, then, Your Honor, if you follow that to the logical conclusion, there could never be a solvent debtor case where there is a disputed liability at any point in the case and that can't --

THE COURT: Oh, no. Because --

MR. PASQUALE: I'm sorry, Your Honor,

THE COURT: -- you're just assuming that the liability isn't disputed. I'm assuming that you're correct on the liability side, for purposes of this discussion, that the number that the parties agreed to and put in the plan, is the liability. But without the plan, the issue is, can that liability be met? It's a huge liability.

MR. PASQUALE: But that is a -- I agree, Your Honor.

That is a different issue. That is feasibility. That's not solvency.

THE COURT: I think it's solvency. I don't think it's feasibility. Feasibility says, that the way that the debtor proposes to pay those liabilities is fixed in the plan and that the plan will work. That's the feasibility analysis.

MR. PASQUALE: Yes.

THE COURT: That has nothing to do with the solvency analysis that we're talking about.

MR. PASQUALE: Okay. Then let's remember what Mr. Frezza did with the various tests which, again, not disputed. The balance sheet, the cost approach, the adequate capital. I should know this by now.

Looking at those tests, Your Honor, and you're assuming now, as you said, a fixed number for asbestos liabilities, that's what Mr. Frezza did. He took the fixed number from the plan and said, solvent. There is no evidence presented by the plan proponents to the contrary. So, we're back again, I think, to the legal issue and I think Coram resolves it, which is, you do look at the plan, you do look at the effective date. I understand the questions Your Honor is raising.

THE COURT: I thought Mr. Frezza -- I'm sorry, I'm going to have to review his testimony.

MR. PASQUALE: He took -- well, I don't think it's

really disputed, Your Honor, and I frankly, think --

THE COURT: Okay.

MR. PASQUALE: -- I don't know that -- I'd like you to, but, you know, again, we're agreed, at this stage, I think it is the legal issue that we're now discussing.

THE COURT: Yes. I just meant, I don't think I recall his testimony in the context in which you're putting it. I thought when he was doing the adequate capitalization and the other tests, that he was assuming that there would be a fixed liability and a whole lot of other assumptions that are not necessarily, borne out, like that the Fresenius settlement would come in and the funds would still be there.

MR. PASQUALE: Absolutely, Your Honor. He took the terms of the plan and used them --

THE COURT: Right.

MR. PASQUALE: -- that's right.

THE COURT: Okay. Well, what I think I'm saying is, if I take the first part of your argument which is that if this settlement had been done in the context of a 9019 settlement, and for purposes of this discussion, I'll just assume it could be that it was approved and that that number is fixed, okay. As of the date of the effective date of the plan, I have that number fixed, but I don't have the plan effective. I can look at the date of the effectiveness of the plan without assuming that the plan has gone effective. So, if I take the

liabilities, that still doesn't show me where the assets are to pay the liabilities, but for the plan.

MR. PASQUALE: Right. And what I'm trying to say, Your Honor is, we gave you that information. We gave you the assets, the liabilities, through Mr. Frezza's undisputed testimony. Assuming that number for the asbestos claims is the number in the plan. He looked at assets, he looked at liabilities, and concluded solvency. That is in the record.

THE COURT: Okay. I'll have to look at it. That's not how I understood what his testimony was. I thought he was making a whole host of assumptions that --

MR. PASQUALE: Premised in the plan

THE COURT: Premised on the plan --

MR. PASQUALE: Correct.

THE COURT: But what I'm suggesting is that the plan isn't the thing to look at. The issue is, what does the debtor look like right now? Well, let me assume today is the effective date. What does the debtor look like right now, before the plan goes effective?

MR. PASQUALE: Well, and I --

THE COURT: Here are the liabilities --

MR. PASQUALE: -- sorry, Your Honor.

THE COURT: -- and here are the assets. How do those assets match up against the liabilities, forget the plan for a moment, just whether -- if this were in a liquidation, for

example, would the debtor be solvent?

MR. PASQUALE: And what I'm trying to argue, Your Honor, and our position is that there is no authority to do anything but take the plan, call them presumptions, assumptions, to take the provisions of the plan, that the debtor is trying to confirm, in determining solvency for these purposes.

We've presented other cases in our briefs and Coram speaks to the point. There is no other authority to support the debtors' argument to do something other than that.

THE COURT: All right.

MR. PASQUALE: Your Honor, just quickly, the remaining issue is the feasibility issue. And Grace and Mr. Bernick argue that, well, if feasibility means solvency, then every case would be a solvent debtor case and unsecured creditors -- well -- that argument goes nowhere, Your Honor, because there is a really big difference between this case and other cases.

As Your Honor knows better than all of us here, most cases are cases in which unsecured creditors are not receiving a hundred percent on their allowed claim. You know, we'll get into arguments of what does it mean to be paid in full, but let's just talk about allowed claim for simplicity.

We know that under most confirmed plans, unsecured creditors are not getting a complete recovery. They're getting

pennies on the dollar, especially these days. So, this issue doesn't arise in every case. An unsecured creditor can only argue, as we are here, on behalf of the lender group, that post petition interest can be paid in cases where they are getting paid in full, and Equity is getting a recovery. Things that are happening, of course, in this case.

THE COURT: But they're not happening in this case.

MR. PASQUALE: Of course, Your Honor. Equity is retaining all of their interest.

THE COURT: Equity is retaining some interests --

MR. PASQUALE: All of their interest.

THE COURT: -- but unsecured creditors are not being paid in full. The ZAI claimants aren't, the personal injury claimants aren't.

MR. PASQUALE: No, Your Honor.

THE COURT: Even on their allowed claims, if you want to use the word claims, they're getting a percentage under the trust.

MR. PASQUALE: By agreement.

THE COURT: Well, yes.

MR. PASQUALE: By agreement. And that's a tremendous difference. They are willing to --

THE COURT: But if this were solvent --

MR. PASQUALE: -- they didn't have to do -- well, Your Honor --

THE COURT: They didn't have to do it.

MR. PASQUALE: They didn't have to. They could have litigated and we would have had a fixed number and, again --

THE COURT: That's true.

MR. PASQUALE: -- that is not the same as cases in which -- I mean, you can do anything by agreement. We, as unsecured creditors in any case, representing unsecured creditors can say, we'll take 50 cents, we'll let Equity have their interest, we all want to get out of bankruptcy. There are a host of reasons, as Your Honor well knows.

I think it is not correct to say that unsecured creditors are not getting paid in full in this case. Those who have agreed to take something less have voluntarily done that for their own reasons because of the contentiousness of those issues.

Your Honor --

THE COURT: Well, the indirect claimants, certainly haven't agreed.

MR. PASQUALE: Excuse me?

THE COURT: The indirect claimants certainly haven't agreed.

MR. PASQUALE: Well, and they have objections to confirmation on that basis.

THE COURT: They do.

MR. PASQUALE: So -- and Your Honor will have to

resolve those.

THE COURT: So, what happens in the event that I say they're correct, to the solvency analysis?

MR. PASQUALE: I'm not following the question, Your Honor.

THE COURT: If the indirect claimants are correct, that their claim should be paid at some level that's different from what the plan currently provides, and that objection is sustained, what happens to your solvency analysis?

MR. PASQUALE: That they are unsecured creditors -- I'm --

THE COURT: Sure. They want paid in full, as opposed to the percentage under the trust.

MR. PASQUALE: If they are properly in our class, Your Honor, of unsecured creditors, they would get post petition interest, that's correct. That would be our argument.

THE COURT: I -- okay.

MR. PASQUALE: That anyone in that class gets because we're getting -- that's the terms of the plan. They're getting paid in full. The asbestos claimants, in particular, Your Honor, having agreed to what they agreed, we all know what that litigation was like. And I can show you the numbers, you'll recall them from the debtors' expert, which are far under what the claimants are receiving today. That would argue that they're getting paid more than what they're entitled. I don't

believe that to be the case, nor do I believe -- I mean, it's a settlement, I think it's an appropriate settlement of those liabilities because it is such a contentious issue, but I don't think it's correct to say they're not getting paid in full.

THE COURT: I think the issue with the indirect claimants is much different, and that is, there isn't even an estimate, at this point in time, as to what those claims will be, and they could be --

MR. PASQUALE: Well, because they're not ripe yet. That's right. They haven't accrued yet.

THE COURT: They're not.

MR. PASQUALE: They're contribution claims, as I understand them.

THE COURT: They're contribution and indemnity claims --

MR. PASQUALE: Yes, right.

THE COURT: -- but they could be huge. So, the solvency issue is what I'm trying to get to.

MR. PASQUALE: Well, and on those, Your Honor, though, there is case law and we've cited it as have the debtors, and I don't think we disagree, the determination isn't made -- when circumstances change later on, there are cases, I think Mr. Bernick even talked about one in his argument, and I'm sorry, Your Honor, I just don't remember the names, they are cited in our briefs, where there were litigation trusts who

pursued a claim post confirmation, ended up with a big recovery and then, after the fact, after the conclusion of that litigation, an unsecured creditor came back and said, pay my interest, because the debtor is now solvent and the cases have said no, that's not right, although there is a split, there are some cases that have allowed it.

I don't think that's where we are today, Your Honor. You haven't decided confirmation yet. But I do think that's the distinction here between solvency and feasibility, in that in most cases unsecured creditors are not getting paid in full. All unsecured creditors, in any form, whatsoever.

Your Honor, just a couple of quick points, and for these last I really just want to rely mostly on the briefs, but I would like to hand up to the Court, if I may, a revised couple of pages from our brief, which we promised to do.

THE COURT: All right.

MR. PASQUALE: May I approach?

THE COURT: Yes. Keep them, Mona, because -- all right.

MR. PASQUALE: Your Honor, what these are and I've just handwritten, marked them as BLG UCC Closing 1 and Closing 2. This is a redline and a clean markup of the couple of pages of our pretrial brief, the joint brief, with the lenders, which provided information as to the market capitalization and closing price of Grace's stock. And this just updates the

information to the putative, effective date of December 31st, 2009. And the closing price that day was $25.35, which would mean a market capitalization of Grace as of --

UNIDENTIFIED MALE ATTORNEY: What date --

MR. PASQUALE: Excuse me?

UNIDENTIFIED MALE ATTORNEY: What date was that?

MR. PASQUALE: December 31st. And, Mr Bernick's charts have very similar numbers. I don't think there's disagreement. The market capitalization is over 1.8 billion, as of that date.

We do think the Third Circuit's ruling in the VFB decision carries some weight. Mr. Bernick has tried to distinguish the case by relying on our financial advisor's deposition testimony, but the important thing is the market in establishing Grace's share price as of that date. Has all of the information that everyone else has. It knows the terms of the plan, it knows the risks, it knows the arguments. And that was what the Third Circuit said in VFB. It's better to look at the market price than to look at opinions of experts.

Your Honor, Mr. Friedman, for Morgan Stanley, made some arguments. I'm not going to repeat them here, I would like to adopt them. I know they've now settled, we heard today. But rather than repeat them, with respect to the history behind the solvent debtor rule and the like, I would like to just adopt that argument.

THE COURT: That's fine.

MR. PASQUALE: And, I think at this point, Your Honor, I'll just reserve to respond to Mr. Bernick. Thank you.

THE COURT: All right.

MR. BERNICK: Would Your Honor prefer to hear the response to this before we go with Mr. Cobb?

THE COURT: No. Actually, I'd just as soon hear all of it, if you don't mind.

MR. BERNICK: Okay.

THE COURT: Mr. Cobb.

MR. COBB: Thank you, Your Honor, Richard Cobb on behalf of the bank lender group.

I want to address quickly on a solvency point. Your Honor, had a question in your mind -- in her mind. You had a question in your mind, Your Honor, as to whether when Mr. Frezza testified he made certain assumptions that settlements would take place. Recall, but let me try to help refresh your memory. Mr. Frezza testified under one scenario the bank lenders believed that there was solvency established and that scenario was taking the debtors' estimate of asbestos liabilities and under that scenario, the debtors immediately said, well, if you take our estimate, that's not the settlement and that could trigger other settlements falling apart. And, so, you can't rely on those other settlements in trying to establish the liabilities that Grace may face, or would face,

on the effective date. And, so, that was one scenario.

Then the other scenario, he said, well, I'm going to assume everything in the plan stays as it is, that we take all of the liability -- we lift the liabilities out of the plan as Grace has stated them. So, there was no hinging or dependency on one settlement versus another under that scenario, in which he found, or he opined that there was solvency as of the effective date.

So, maybe that helps Your Honor. There were two separate analysis. One was interdependent, the other was not.

THE COURT: All right, thank you.

MR. COBB: Your Honor, we have briefed, exhaustively, the issues, I think, that I'm about to address. I know I'm about to address them.

First impairment, and then we also have talked about and discussed and briefed, default.

There have been evidentiary presentations at trial with regard to solvency, of course, and also under 1129, fair and equitable standard. I would like to try to distill, quickly, what remains in dispute, both factually and legally, to help the Court understand what's left to be decided, in order to resolve our objections to the plan.

Mr. Pasquale has just addressed solvency. I think there are three issues that the Court has reserved for this stage of the proceeding other than solvency, and that is

whether the bank lenders have a contract right to interest higher that the rate offered in the plan, characterized by Grace's default rate. Number two, are the bank lenders impaired, and number three, has Grace satisfied the fair and equitable standard?

The first two involve pure legal issues. Facts are not in dispute, that is whether a default -- or whether the bank lenders have a right to receive a rate of interest higher than that, that exists in the plan now. And impairment. There's no issues of fact that remain between the parties on those.

On default, what must first be examined is under impairment, do the debtors have a legal defense to the effect of their failure to pay principle and interest, post petition? And the effect of the filing of the bankruptcy.

Next, on impairment, the Court must decide what Grace must do to overcome the presumption of impairment. And, specifically, and has been underscored by Mr. Bernick, is this plan impairment or is it code impairment? The bank lenders don't disagree that if the code impairs their claim, then they are not impaired.

Lastly, the Court must decide if the plan meets the fair and equitable test and in doing so, the Court must first decide here, what is the test to be applied under these facts, where an unsecured creditor is claiming pendency interest and

the debtor is solvent. There is a dispute among the parties as to what's the test. Is there a presumption that the contract default rate should be paid, and you come down from there, based on negative or bad equitable factors, or is there a floor of the federal judgment rate and you can go up from that rate or come down from it.

We submit the test, as is outlined in Dow, and as identified by Judge Walrath in Coram, there is a presumption that the contract default rate applies unless compelling equitable circumstances exist. Meaning, primarily, was there some bad conduct engaged in by the objecting creditors that merits a reduction in the contract default rate?

Grace disagrees, says you can look at every fact, the Court has wide discretion, there is no polestar. There's nothing for the Court to rely on, perhaps, the federal judgment rate, but otherwise, toss it all in a basket, stir it around and if it feels good, that's the rate that you should choose, Your Honor.

These are critical legal issues for the Court to decide and, again, the disputed issues of fact remain only the factors which we suggest lean heavily towards what conduct was engaged in by the creditors, that are seeking to recover the interest.

Briefly, on impairment and default issues, let's understand that impairment, can we vote, are we going to be

disenfranchised as a result of Grace's arguments? That's what we're talking about the first step. It's not necessarily we are entitled to interest at a rate higher than the plan, but do we have the right to even vote, to even stand here right now and object? Congress has demonstrated a strong belief in favor of creating creditor voting rights, so strong there is a presumption of impairment. Grace must overcome that presumption. Different than 1129, there's no presumption that the plan is fair and equitable or that it's not fair and equitable. Grace has to prove the 1129 factors. But, for impairment, there is a presumption.

Are the bank lenders legal, equitable or contract rights altered in some sense? Stated differently, Grace must leave those rights entirely unaltered for us, that is the bank lenders, to be unimpaired. How does Grace attempt to overcome this heavy presumption?

First, there is no contract right to default interest, Grace says. Second, the plan doesn't impair, the code does, that's permissible; 502, 726, et cetera. Of course, we disagree.

Let's focus on, and I'm mindful here of the Court's May 19th opinion. I'll talk about that in a few minutes and some thoughts and I think, hopefully, the Court will agree with me and that they are good thoughts.

But let's start first with some, what I think are,

real issues with Grace's arguments on default. First, they have now presented to the Court what I'll call the freeze argument. Bankruptcy is filed, the contract and the rights of the creditor under the contract, are frozen. They cease to exist. The fundamental problem with that issue, Your Honor, is is that that would have the same effect with regard to prepetition defaults. Bankruptcy is filed, freeze. You would never get to -- you could never award pendency interest, Your Honor, because (a) rights that would be available to that creditor, this plays into the fresh start concept, you would --

THE COURT: I missed the -- I'm sorry, Mr. Cobb.

MR. COBB: Sure, that's okay.

THE COURT: -- I just missed the fundamental premise because there is a freeze on prepetition claims and prepetition defaults with the filing. So, I'm -- I got stuck on that. It does accelerate the liability, but the prepetition, unpaid accrued interest is part of the claim, up to the date of filing. The problem here is, there isn't any.

MR. COBB: Well, Your Honor, the freeze argument, the way Mr. Bernick has characterized it, is that there should be no effect during the pendency period with regard to the debtors' obligations to pay interest. And if we're willing to accept that that would -- if we're willing to accept that that would accelerate the obligations, and so we talk about interest on the allowed claim, which is not what we have here, and we

agree with that, then that would change the analogy. I agree with Your Honor.

But, Your Honor, the freeze concept ignores other sections of the code that specifically give effect to post petition defaults, 365, you must cure a post petition default; 1124, where you're looking to --

THE COURT: But you don't have a 365 claim. I mean, you have to make -- the arguments at least have to be relevant, this isn't a lease and the issue that Congress was addressing in the executory context is much different from the financial covenants that you have here.

MR. COBB: I agree, Your Honor.

THE COURT: Okay.

MR. COBB: And, I'll get to the Next Wave in a few minutes because I think that is the issue.

THE COURT: All right.

MR. COBB: But let's understand the philosophy, then. If there is not a specific prohibition in the code, with regard to the effect of a post petition default, and what effect that has with regard to pendency interest --

THE COURT: What post petition default do I have?

MR. COBB: Well, Your Honor, the loans matured in 2001 and 2003.

THE COURT: And the debtor couldn't pay them because they're unsecured claims. So, if there is any impairment in

that fact, it is clearly created by the code.

MR. COBB: Well, let's talk about that for a moment, Your Honor. What in the code specifically prohibits the debtors from making that payment?

THE COURT: From paying unsecured creditors? The absolute priority rule. This Court would --

MR. COBB: What happens on the first -- yes, Your Honor?

THE COURT: -- this Court would absolutely, under no circumstances, permit the debtor to be paying unsecured claims at that time, when I have no way of knowing whether the plan is going to be confirmed or whether unsecured creditors would be called on to return funds because the case converts and is liquidated. So, there is no basis for paying unsecured claims, absent some -- and you want to talk about first day orders type of circumstances, where the court's have found extraordinary circumstances on motion. But, here, none of that has happened.

MR. COBB: Your Honor, in June of 2008, there was a settlement reached with the EPA and the creditors, upon application to the Court, they satisfied that.

THE COURT: Yes, they did, on a motion.

MR. COBB: That's correct. But -- that's correct, Your Honor, but that doesn't mean that the debtors are prohibited, it simply means that on motion -- on motion, they can pay that claim.

THE COURT: Well, I -- in some circumstances they can pay that claim. Allowing the debtor to simply pay an ordinary, and this is an ordinary financial claim, I think is a whole lot different from saying that there's a peculiar reason that authorizes the debtor to make a specific payment to a specific creditor because, and then you can add whatever the extraordinary reasons are. But, I don't have any of that here. So, I go back to my questions, what post petition default? Yes, this obligation matured and, yes, it's going to be paid, in full, with interest, on the effective date.

So, the --

MR. COBB: Your Honor, I -- and I understand Your Honor. You leaned this way in your May 19 opinion, there was an appeal filed from that, we disagree with regard to the effect of that default, and that's okay, Your Honor, that happens all the time.

THE COURT: Oh, no, no, no. No. Mr. Cobb, you said this before and I tried to straighten this out before, apparently, I didn't succeed. That opinion was talking about allowed claims and whether interest is an allowed component of an allowed prepetition claim. It had nothing to do with the impairment and fair and equitable standards. I tried to make that clear. Apparently, I didn't succeed, but, I tried to make that clear in that opinion.

So, if you want to go back and talk about interest on

allowed claims, as part of the prepetition analysis, we can re-discuss that. You're not going to get me to change my mind about that.

MR. COBB: No, I'm not going to do that, Your Honor. That's inappropriate.

THE COURT: But, that's a different issue from fair and equitable and impairment.

MR. COBB: Sure. Well, Your Honor, let's move then to the concept of was there a default or not a default? Let's understand that once the loan is matured, there was no other interest rate that applies under the loans. The credit agreements provide that upon maturity, the rate that applies is a rate that is 2 percentage points above the base rate, the adjusted base rate. And that is not the rate that is being paid in the plan.

In our -- I'm a little ELMO challenged, Your Honor, particularly because of the distance that I have to travel, but --

MR. BERNICK: If you want I'll be your assistant.

MR. COBB: No, please, don't. You and I have had that discussion before.

(Laughter)

MR. COBB: Your Honor, if we take a look at the credit agreements, you'll see that there's a section, Section 5, that talks about what the interest rates shall be. And,

you'll note, Your Honor, there that it says, if the interest and principle is not paid, whether at the stated maturity or otherwise, once the loan is mature, the interest rate is the rate that we have been propounding to the Court is the appropriate rate in the plan.

THE COURT: Yes. And this agreement is essentially -- I don't know whether the right word is delayed, deferred, not relevant, because of the fact that the debtor was not permitted to pay the loan on maturity. That's the problem with the concept of bankruptcy code impairment. This debtor could not comply with that obligation in the normal run of the mill circumstance and I wasn't presented with anything other than that. No one, not the bank lenders, not the debtor, no one raised that issue.

MR. COBB: That's correct, Your Honor. And so I think the question then, on a finer point is, in the context of what interest rate would be appropriate to award in the pendency period, that's the agreement of the parties. That is the contractual agreement between the parties and is not the -- we are -- Your Honor, it seems to be mixing a 362 concept here, that there's an automatic stay from our ability to enforce rights, our ability to enforce -- to come in and try to collect this payment. 362 does not have anything to do with the effect of non-payment during the bankruptcy, in regard to pendency interest. It only prevents us from taking action.

THE COURT: That's right. You're not allowed to have pendency interest, but for certain circumstances, (a) a solvent debtor, you know, the other types of things. There is no entitlement to pendency interest. So, the automatic stay doesn't have to do anything to stop the collection, because you're not entitled to it.

MR. COBB: That's right, Your Honor. Grace cites that as the authority for this no effect, or the freeze concept that obliterates any reference to the contract rate of interest that will be applicable during the period.

THE COURT: Pardon -- Mr. -- folks, please. Mr. Bernick, take your discussions elsewhere if you're going to have them, please.

MR. BERNICK: Yeah, yeah, yeah, no that's fine.

THE COURT: Mr. Cobb, go ahead.

MR. COBB: Your Honor, I think that this issue is underscored by the fact that the only authority that Grace cites is the Next Wave case and Your Honor did cite that in your May 19 opinion. I want to try to gently ask the Court to take another look at Next Wave.

THE COURT: I will.

MR. COBB: And, Your Honor, let me raise some specific points, because that is the only, the only authority, that Grace cites, case law that says for this proposition, that it's a nullity, it's -- meaning it would be useless to describe

the debtors' inability to make -- to fail to pay something post petition, because they are unable to pay it.

In Next Wave, first, the opinion was vacated, the court lacked jurisdiction to issue it. Second, that is dicta. the court reaches it's holding before it gets to this wonderful quote that Grace lifts, that seems to serve their purpose here and then the quote sits by itself. There's no reference to the code, there's no reference to any case authority, it just sits there. It's entirely unsupported in law. Simply meaning that there is no other authority -- there's no other -- there's no Third Circuit authority, there's nothing binding on the Court that requires you to follow that, nor is there anything persuasive, and Next Wave is far from persuasive. That comment is made in the context of the FCC seeking to terminate and then the result being a forfeiture of the debtors' principle asset in the case that would have absolutely cratered the debtors ability to operate post bankruptcy.

In fact, the United States Supreme Court agreeing with the district of -- the circuit court of the District of Columbia. The United States Supreme Court says that that case turned entirely on 525. There was a specific prohibition in the code preventing the federal government from attempting to do what -- that is terminate the license and effect that forfeiture.

In other words, Next Wave is not only factually

distinguishable, it is clearly, legally distinguishable. And if this entire argument, that our entire position were to fall on Next Wave, that would be, in our view, a miscarriage of justice. It just isn't --

THE COURT: I'm sorry, are you telling me to re-look at -- asking me, I didn't mean --

MR. COBB: No, I'm not telling you anything, Your Honor.

THE COURT: Okay.

MR. COBB: Believe me.

THE COURT: Are you asking me to re-look at Next Wave for the purpose of determining whether there is some entitlement to post petition interest or require the debtor to pay off the loan at its maturity, even though it's an unsecured claim and the debtor -- the absolute priority rule wouldn't allow it? What are you asking me to --

MR. COBB: Your Honor, we're talking about pendency interest.

THE COURT: Yes.

MR. COBB: And we are talking about a default that could give -- what is the appropriate rate of interest under the contract, and Next Wave is talking about an entirely different issue.

THE COURT: Okay.

MR. COBB: An entirely different issue.

THE COURT: All right

MR. COBB: As are -- as I do believe, Your Honor, as Your Honor has stated, that the debtor is unable -- without a court order, to pay unsecured claims during the course of the bankruptcy. And, therefore, that gives -- the Court should give no effect to a default where the debtor is unable to pay. And, we know the court gives effect to defaults where the debtor is unable to pay, on a regular basis. Leases. A default post petition, they have to pay it, in order to stay in the property.

You said -- and your response is, Your Honor --

THE COURT: Actually, they have to pay --

MR. COBB: -- Mr. Cobb, this isn't a 365 case, it's not a lease case.

THE COURT: No, it's not. They have to pay the defaults' prepetition in order to stay in the property if they want to assume the lease. It's entirely different. They don't have to do anything here, except pay whatever the law requires them to pay to satisfy this claim. And it's not -- I'm still failing to follow why there is a default that is created by anything other than operation of law. That's where I'm missing this argument.

The debtors -- I'm not aware of -- well, I'm aware of one case, I'm not sure it was recorded, in which the debtor was permitted to make a payment to an unsecured creditor before the

end of the case, and I think it was a mistake. Other than those circumstances where -- that I've just analogized, where there are unusual circumstances that would permit a payment to a specific creditor for some odd reason. If you can cite me to some cases that say that in a Chapter 11, debtors are just generally allowed to make payments, willy-nilly to whomever they please, without a plan confirmed by this court, I'd be happy to read it, but I'm not aware of one.

MR. COBB: Your Honor, I wouldn't do that, I'm not trying to be facetious in any sense. Those cases don't exist, because the debtor cannot willy-nilly make payments. But the debtor can make payments upon a showing to the court, either under the necessity doctrine --

THE COURT: Right.

MR. COBB: -- or, as Grace did here, which I assume was under the necessity doctrine or some version, thereof, the EPA settlement, where they paid --

THE COURT: But that's the problem. I don't have that issue with respect to this claim that you're now talking about and the post petition interest issue that's before me. No one approached the Court to say why, I'm not sure you could, frankly, why this particular claim had to be paid ahead of schedule, i.e., ahead of the effective date. And I'm still not hearing any reason why the debtor would have to pay it ahead of the effective date, frankly, but let -- so I don't have that

issue. I don't have a circumstance where a motion was filed and debtor was ordered to make a payment and then the debtor didn't, so that there was a default. This is -- if there's a default at all and I'm not convinced there, but if there's a default at all, it's created by the fact that the debtor is not permitted to make an unsecured payment during the course of the case until -- in our case, the confirmation of the plan.

So, I'm still losing why, if this is an impairment issue, it's not driven by the code, and if it's a default issue, why, when the debtor is not permitted to make the payment, the debtor is then charged with having created a default.

MR. COBB: Your Honor, for the simple -- and Dow -- Dow didn't struggle with this point, because there was no prepetition default in Dow. The court said, look at the contract between the parties. When allowed claims -- allowed claims settled or otherwise are paid in full, and Equity is retaining an interest and the debtor is solvent, then you turn to the contract between the parties. You turn to the contract between the parties and you say, what does that contract dictate with regard to the legal rights between the parties? What's the benefit of the bargain that the debtors achieved and in this case, as it was in Dow, there's higher rate of interest provided for under the contract. And there was a default, Your Honor.

I appreciate we're jousting about the legal affect of that default, but there was a default. I mean, they didn't pass back a half a billion dollars over a period of time, when it came due.

THE COURT: And, they're going to, with interest, which is what the law requires them to do. So, to the extent that there is a default, and again, I'm not convinced that this can be treated as a default under the contract, when the contract can't operate by virtue of the operation of the bankruptcy code. I don't know how you can charge somebody with a default when they have no ability not to default, if that's the way you want to put it.

MR. COBB: Your Honor, it is simply in the context of how do we assess the rate of interest to be applied. That's it. It's not stripping away, coming in and taking the half a billion dollars back, they got -- they enjoyed the use of that principle during the case. They certainly didn't have to pay it back. Whether they had already spent it or not, they didn't have to pay it back.

THE COURT: That's true.

MR. COBB: But, in this context, Dow instructs us that you take a look at the contract rights between the parties. That's -- the -- so, let's move on from Next Wave. You've taken me a little afield, Your Honor.

Let's talk about code impairment, Your Honor.

THE COURT: All right.

MR. COBB: Let's move from default into impairment. Grace has spent a great deal of time, I think, arguing that the plan doesn't impair, the code impairs.

Their code impairment argument, Your Honor, is driven off of your definition of what the legal rate of interest is. That is -- and that flows right from the precise language of 726. Grace says, 502(d) prohibits the recovery of unmatured interest as part of an allowed claim, except in two exceptions. Your Honor mentioned this in the May 19 opinion. And, those two exceptions, one of which doesn't apply here, the other is, where the debtor is solvent, but even that exception Grace submits, the rate of interest to be applied is only the federal judgment rate. That's not what 726 says on its face. So, we can't just assume that, can't just blithely throw it out there.

THE COURT: No, it says the legal rate.

MR. COBB: It says the legal rate. And, in fact, when the bankruptcy code was enacted, the federal judgment rate didn't even exist. That came to be as a part of an amendment to Title 28 of the U.S. Code in 1980 -- excuse me, in 1982. And, so, at the time the code was enacted, Congress didn't even contemplate that the federal judgment rate would apply.

And, so, based on, as we have submitted in our papers, based on Dow and based on Coram, there's a rate above the federal judgment rate, the courts have found, that a party

may be entitled to in a solvent debtor case. And, in fact, Dow instructs that there is a presumption, a starting point of the contract default rate. And so, because we are not being paid our contract default rate, we are impaired. And that's not solved because the code impairs us under 502 and 726, because 726 does not limit your recovery to the federal judgment rate.

Your Honor, I want to make sure Your Honor understands that.

THE COURT: I understand.

MR. COBB: Okay. And, so the debate there is, what does the legal rate mean? They cite Cardalucci (phonetic), I believe, Your Honor. Cardalucci, that's a perfect case to apply the federal judgment rate because the over which the parties are fighting was a state court judgment. So, there was no contract.

THE COURT: Folks, please. I've asked you before, I'm going to tell you to leave the courtroom if you do it again. I really want to concentrate and the whispering -- and I can hear your discussion, is really not what I want to do and I don't think you want me to. So, please, let me concentrate on Mr. Cobb. If you need to speak, either pass notes or leave the courtroom, please.

I'm sorry, Mr. Cobb. Would you back up to Cardalucci?

MR. COBB: Sure, Your Honor. Your Honor, the primary

authority that the debtors cite is the Cardalucci case, in attempting to persuade the Court that the federal judgment rate should be applied. If the federal judgment rate is what is meant under 726 and traces to 503 and, therefore, we have code impairment here and not plan impairment. The plan does not provide that the bank lenders are to be paid the contract default rate, and thus, we submit that that impairs us, because it alters our legal or contract rights.

We are entitled to vote, we're entitled to be here and stand here and object. We are entitled to have a say. We are not disenfranchised. And that's a presumption that the debtors must overcome. It's interesting that they go to 726 and claim, oh, well, that provides code impairment, because 726 also assumes solvency. And because impairment is presumed and because the debtors must demonstrate that there is a code limitation, that there is not a plan impairment or limitation. The debtors have to, in order to successfully prove this argument before the Court, I don't know how the debtors get away with not having to prove solvency.

I mean, I don't know what argument the debtors are hanging their hat on here. I mean is the -- if they're going to rely on plan impairment, then they would have to demonstrate that, yeah, we're solvent, but you only have to pay the federal judgment rate.

Solvency has been established, we believe, and we

therefore would submit that under their primary argument it seems now, and it was the emphasis placed certainly in their opening argument, there is no plan impairment because that's not what the legal rate means.

That's all I have, Your Honor, on default and impairment. If the Court has any other questions, I'd be happy to answer them. I would just like to -- I'd like to make certain that we're clear on -- Your Honor seems to be stuck on this contract default and the code. There is a legal defense so-to-speak, to having the rate apply.

There is a default, if Your Honor has any questions about it, I'm happy to address that, but there has been a default. The effect of the default, I think, is where Your Honor is concerned. Your Honor seems to have not moved passed that.

THE COURT: No, I'm still not to the point where I think there is a default. You're arguing that there's a default because this contract that was in existence, prepetition, says that it the loan matured on a certain date and, therefore, as of that date, but for the bankruptcy, the debtor would have had to have satisfied that loan obligation and if the debtor didn't, as of that, but for the bankruptcy, then that provision that you've cited, Section 5, I think, you said, indicates that a default rate of interest would apply. I don't have any problem with that interpretation, but for the

bankruptcy.

Where I'm getting hung up is the fact that the bankruptcy changes the rights of the parties. It simply does. It does it by operation of law. The lenders no longer have the right to say to the debtor, you've got to satisfy this loan on its maturity date because the bankruptcy code says to the debtor, you can't satisfy this loan on the maturity date and the court can't require the debtor to do an impossible task. And it would be impossible, in the legal sense, for the debtor to satisfy the contract obligation during the course of this case without a confirmed plan.

So, I don't think, if that's the case, where the code itself imposes on the debtor an obligation not to pay what the debtor otherwise would have had to have paid, that the debtor can be treated as in default, because the code lifts that obligation from the debtor to make that payment and defers it to a different date.

So, the problem, I think, is that the lenders' view is that the contract should govern, even though there's a bankruptcy, but the contract doesn't govern while there's a bankruptcy and the issue is, how does it get reinstated? Here, the debtors essentially are reinstating the contract by paying it off, in full, on the effective date. That's basically what they're doing and the issue that the lenders raise is whether in reinstating you have to ignore the fact that there was a

bankruptcy. And so, the default that would have been in existence but for the bankruptcy, suddenly springs back to life and now the debtors are obligated to make this default rate of interest payment, because the contract is now back in effect and that's what the contract required.

But that, I think, Mr. Bernick's argument, that that penalizes the debtor for obeying the law, is correct. That penalizes the debtor for not making the payment that the law says the debtor couldn't make. And it's a conundrum, it truly is a conundrum. The resolution, it seems to me is, that you go back to what the code says and you look at 726 and I'm back to the question of legal rate which, I did not decide in the 502 issue, I did cite the Ninth Circuit opinion, it seems to me it's pretty well reasoned, but I was looking at the issue of what's the legal rate for an allowed claim, under 502, not for this purpose.

MR. COBB: Sure.

THE COURT: So, I wasn't attempting to make a definitive assessment of what the legal rate ought to be. It seems to me that there are choices. The case law provides you with choices. The federal judgment rate, whether it was within Congress' contemplation at the time the statute was enacted or not, is a rate that is pretty much universally applied. There are some exceptions. The contract rate is another rate that from time to time is applied. The state judgment rate is from

time to time applied, given certain circumstances. The default rate is rarely applied. It is applied in very, very highly unusual circumstances, generally where you have a solvent debtor, where all claims are being paid in full and there is a return to some form of equity.

Here, those factors are, in my view, not necessarily satisfied. I still don't know how this debtor is solvent. Now, if I adopt Mr. Pasquale's argument, I understand how the debtor is solvent, but it seems to me that the test can't be to mix the standards of the debtors' solvency with the reorganized debtors' solvency. That's not what the code requires. And this debtor, but for the plan going effective, isn't a reorganized debtor and probably isn't solvent. And that's where, I think, the rubber meets the road and where I have to think through this analysis.

MR. COBB: Well, Your Honor, that's very helpful to hear that, because that's, of course, that's what lawyers like to hear, is what is the judge thinking, where is she -- where is he or she, you know, where is she concerned, how can we help address those concerns so that our client prevails. It's a little self-serving. But it is helpful to hear that. There's a lot there.

But there's a couple of things that I wanted to lift from that, and I think the first point is, is that Your Honor has recognized that in some circumstances, unusual

circumstances, very unusual to have a return to Equity in a bankruptcy case. Very unusual to pay allowed claims in full, whether that it by settlement, or otherwise.

THE COURT: Actually, Mr. Cobb, I haven't recognized that it's unusual to return to Equity, that was Mr. Pasquale's argument. In the cases in which I've been adjudicating matters, generally there is a return to Equity. Now, it's usually negotiated, and it's not in full, but there is usually a return to Equity and the former company owners, in almost every mom and pop grocery store, I haven't seen anything but a return to Equity. So, I think the rule of thumb, generally is, that there is a return to Equity, not that there isn't a return to Equity. I think that stands the cases on its head. Whether there is a return to Equity in the huge cases, that may be a somewhat different issue, but in terms of the run of the mill, average case coming down the pike, there usually is a return to Equity. So, I don't agree with that analysis. Let me just interrupt to that extent.

MR. COBB: Your Honor, let's accept that then. I fully accept it because the Court said it. Assume that the ordinary case is that there is a return to Equity, then I think that we have to -- I would suggest to the Court, we believe that Dow is persuasive here. And, I'm going to speak to it a few minutes because Your Honor seemed to raise some concerns about Dow, towing the line with Grace that, perhaps, Dow is

different than what we have here, but I'll talk about that in a minute. And, I think Dow instructs us in a careful reading, that based on a great body of case law that's developed pre-code, that in a situation where there is a return to Equity, where Equity is now receiving the recovery, that means that all of the debt, all of those parties who have a different relationship with the debtor, they are creditors, there's a creditor/borrower relationship in some sense. They have been paid in full. And what Dow says is, in that instance is it fair, is it appropriate, based on this body of law that we have watched develop over the decades, to do anything other than start from a presumption that the contract default rate should apply because, yes, the debtors have defaulted. They are protected from the effect of that default during the course of the bankruptcy, but when we get to confirmation and now the question is, what is the correct rate of interest to apply, we now take a look at what is the rate under the contract that should apply in those circumstances, before Equity receives a recovery. You've got to satisfy the benefit of the bargain before Equity gets a return. That's what Dow, I believe, instructs us. And let me talk for a minute about Dow because I want to dissuade any belief in the Court's mind that Dow is different.

The dispute in Dow was about the recovery of pendency interest at the contract default rate. There was no post

petition default. And the courts --

THE COURT: But, was there a prepetition default?

MR. COBB: Excuse me. There was no -- excuse me, there was no prepetition default.

THE COURT: All right.

MR. COBB: And I can give Your Honor -- I even wrote down the cite, 456 F.3d. 673 in the Sixth Circuit's opinion where they acknowledge that. Now, I also will note that Mr. Bernick's law firm and Mr. Bernick had been very active in that case and that case has not been resolved yet. And so, I don't fault Mr. Bernick, if on the issue he takes a consistent line that he's taken in that case, he has to.

Your Honor pointed out in the May 19 opinion that the cases Dow relied on have no factual similarity to the cases here. There was a comment made to that effect, and cited the Southland and the Terry case and the Casablanca case. That's right, Dow distinguished those cases because those cases are different than where you have -- they were insolvent debtor cases and Dow said this isn't an insolvent debtor case, we have a solvent debtor case. An insolvent debtor case, you're talking about, what's the right rate of interest. When I have to figure out which of the creditor body on this side of the line, not on the Equity side, which of the creditor body is going to recover what? To what extent on their allowed claim should they then recover interest? It's an insolvent debtor,

Equity is not receiving anything. No recovery.

So, those cases are actually -- you would agree with Dow and I think Dow would agree with you, that those cases are distinguished. Dow didn't rely on those case, but to say that when you have a solvent debtor, it's different. Now, you're talking about apportioning value between Equity, who comes last in line under the code, they are the caboose, no offense, Mr. Frankel, they are the caboose. And so, we think that Dow is persuasive and that it controls here.

There was a comment made in the opinion in footnote eight that the issue in Dow was different. I'm not sure what's meant by that statement, I'll reiterate, the issue in Dow was, there was no prepetition default, attempt to collect pendency interest at the default rate. There was some reference that the contracts in Dow provided interest at a non-default rate that was higher or lower than the federal judgment rate --

THE COURT: Which is different from here.

MR. COBB: -- but that's --

THE COURT: It was the obverse in Dow. They were getting paid under the plan -- I've forgotten now, something that was higher than the contract and the federal judgment rate, I think, and here -- I've forgotten the facts now, but, anyway, it was different from here. Here, the bank lenders are getting more than the contract rate, more than the federal judgment rate, less than the default rate and there was

something different in Dow, but I don't recall now what it was.

MR. COBB: I don't think so, Your Honor. And, I know Mr. Rosenberg has been pretty active in that case as well.

THE COURT: Okay.

MR. COBB: You can see him shaking his head vigorously.

MR. BERNICK: I'll -- I litigated that case and I'll be happy to clarify that.

THE COURT: All right.

MR. COBB: Can't wait to hear, Mr. Bernick. So, Your Honor, those are our thoughts on Dow. We don't think that it's distinguishable, we think that it is very instructive here. In fact, we think it is persuasive.

So, I think that is the best I can do on my feet, responding to Your Honor's concerns and I think at this point, what that leaves us with is then, a discussion as to -- we'll actually talk about some evidence, and let's talk about fair and equitable and the test.

Grace has to satisfy every element of 1129 as it knows it does, in order for confirmation to be approved. Again, referencing Dow, the history of fair and equitable is best described in Judge Specter's lower court opinion in Dow, in which he demonstrates, the concept has long existed in law, and develop -- and then ultimately the Court of Appeals in Dow says, well, now, there's a presumption in favor of awarding

contract default rate and there may be compelling equitable considerations to suggest we should come down from that rate, but that's the test. That's what I, Your Honor, I alluded to earlier. There's a debate here on which is the appropriate test to apply.

The point is, Your Honor, Dow instructs us and we'll talk about Coram in a minute, the bank lenders do not have to earn their interest. Don't have to earn their interest by proving positive equitable factors. It's from a higher rate down. It's a top down analysis, it is not bottom up. We don't need to prove anything, other than what is the applicable rate in the contract and we have done that, post maturity. They don't need to earn it.

Let's talk about Coram for a moment, Your Honor. And I'll cite at 315 B.R. 347. Judge Walrath says, "As a result of the peculiar facts in Coram, we conclude that allowing the noteholders to accrue post petition interest at their contract default rate would not be fair and equitable." Top down.

And Coram is pre-Dow, pre-Sixth Circuit Court of Appeal decision and Judge Mary Walrath found that we should start at a rate that is higher than the federal judgment rate. And, then Dow confirms that.

Let's talk about Coram in a little more depth, from a different angle than Mr. Pasquale referenced it. Bad conduct in Coram. I don't know if Your Honor has read the opinion

recently, but Your Honor may recall that -- I was, frankly, openmouthed when I read the opinion, that the debtors would dare to come back in again and try to present the same witness and Judge Walrath says, essentially, that that resulted in gross delay during the case, dramatic delay, where there was a real conflict of interest that she had identified, I think, on the record, at the first confirmation hearing. The debtors then, between the debtors' CRO and, I think, one of the noteholders that was claiming it was deserved a higher rate of default interest.

Just prior to the petition date there, that CRO, with the -- I think he held the CEO title, as well, that representative of the debtors who was conflicted, caused $6.3 million in payments to go out the door to the noteholders who were then seeking the contract default rate.

The trustee put on evidence that it cost the estate 12 to $15 million, because of this delay, multiple confirmation proceeding because of the conflict.

Judge Walrath rejects an argument that Grace has advanced here, Pages 343 and 344 of the opinion, and adopts Dow's reasoning. Paying in full the value of the allowed claim does not satisfy the absolute priority rule in a solvent debtor case. And she cites Dow with approval. She also cites San Joaquin State and Gaines with approval, to not award interest in a solvent debtor case is abuse of discretion. I'm not sure

we have a debate on that at this point. I think Your Honor said, some rate of interest needs to be provided.

The federal judgment rate is not the required rate. Even the most egregious conduct, which is pretty stunning, brought that rate down from the contract default rate lower, to the federal judgment rate.

Now, let's turn to what -- the conduct of the bank lenders, that Grace has introduced or cite into evidence. It doesn't appear in its reply brief, I read that many times in this interim period, just to be sure I hadn't missed anything, but there was no conduct cited. There's a lot of allegations, there's a lot of lawyer argument, but there's no evidence of any scheme. And I think Grace, feeling the pressure of Coram, has now, at this eleventh hour, tried to present a scheme, where the bank lenders did something bad, that they somehow hid in the weeds and allowed these settlements to go forward. The bank lenders, not the Committee, but the bank lenders hid in the weeds.

We know that the Committee, at one time, supported a different plan and Your Honor also discussed this in your May 19 opinion, a different plan some time ago that either has expired or very likely the conclusion will be it has expired, under its very terms. It's not the plan that's been presented to the Court at this confirmation hearing. It was cash plus equity, was the return to unsecured creditors.

Sure, the 6.09 percent interest rate appeared in that plan, but they also -- part of the recovery was there would be an equitable piece you could share in the upside.

The plan support letters that we've seen many times in the course of the confirmation hearing and otherwise, that were signed by counsel to the Committee, there has never been an allegation by Grace that there was some sort of improper or unlawful participation by the bank lenders and their role in the Committee. There's never been an allegation that the Committee was improperly controlled by the bank lenders. There has never been any evidence or proof of that. The Committee acted as the Committee. So, Committee, qua Committee, executed both of these letters.

(Attorney occasionally walks away from microphone)

Let's take a moment and review them. Your Honor, I don't think there could be any serious dispute, although there attempts to be some shading by Grace here, that the letter is addressed to counsel for the debtors and it is presented by Mr. Kruger, counsel for the Committee. It's never been alleged that Mr. Kruger is not counsel to the Committee. There are several events, as I think the Court has already recognized, that failed to occur in the context of the 2005 letter agreement. Of course the disclosure statement that was submitted in that context was never approved, certainly was not approved by November 30th of 2005, and a joint plan, a plan

submitted both the Committee's behalf and the debtor's behalf, that never became effective.

Again, under that plan, Your Honor, there was a different recovery, not just interest at the 6.09 percent, paid in cash, but there was a recovery of cash, as well as equity, that the Committee supported.

Your Honor, we can move on then to the 2006 letter and, Your Honor, it looks remarkably the same. There's an adjustment with regard to the rate of interest that is to be paid with regard to the prepetition bank credit facilities you'll see, Your Honor, but, again, this is submitted by Mr. Kruger, on behalf of the Committee, acting as a fiduciary for all of these petitions.

As Your Honor knows, well knows, the Committee cannot vote, the Committee cannot bind any single member as to how they would vote their claim, up or down, it's the Committee as a political voice, that's it. The Committee has the ability to try to persuade others that this rate of interest is, by way of example, is the appropriate rate, you should vote in favor of this plan. The Committee doesn't vote and it can't bind its members. I don't think there any serious contention from Grace in that regard.

And I don't think, Your Honor, that your May 19 opinion says that the Committee bound individual members. I think you were pretty clear in your footnote, one little, maybe

wrinkle on the former and latter, but I think if you read that in any light, and any interpretation that's reasonable suggests that the Court decided exactly that. That the Committee was acting on behalf of the Committee and its members, as a fiduciary, but didn't bind any members. And wasn't -- that these letters were never submitted and these rates agreed to by a particular creditor.

Let's look for a moment, if you will, in the same theme, regarding testimony that Mr. Tarola provided. He was the CFO of Grace up until October of 2008. (Indiscernible), Your Honor, because we've got the slide up. You'll note that Mr. Pasquale is conducting cross examination here and he says, "Mr. Tarola, you said in response to Mr. Bernick's questions that Mr. Maher was negotiating with you on behalf of not simply the bank holders, but all (indiscernible) creditors." In fact, leading up to the January 12, '05 agreement, you mention Mr. Maher specifically requested and it was agreed to, a specific rate for non-bank lender creditors. And that wasn't surprising to you because you understood, did you not, that Mr. Maher was negotiating as Chair in the Creditors' Committee.

And then it talks about Mr. Tarola admits there was -- the letter agreement was not signed by anyone other than counsel for the Creditors' Committee and counsel for Grace.

Further down the page, it says that there's certain termination events, Your Honor, and then it also discusses the

expiration period of those dates, that became an issue as to whether or not the Committee would renew the agreement. Mr. Tarola says, "Objection." "Isn't it true, Mr. Tarola, the disclosure statement was never approved and a joint plan was never approved?" And so Mr. Tarola appreciated the effect of those conditions in the 2005 letter agreement, which also appeared, again, in the 2006 agreement and those events never took place. He appreciated that the Committee was presenting -- the Committee has been bound to those agreements, not the bank lenders, not any particular creditor.

Later on, Mr. Pasquale -- now, we turn to -- Mr. Pasquale asked, "Did you obtain the signature of any bank debt holder on any document obligating that holder for the joint plan?" Mr. Tarola says, "Not to my knowledge." "Did Grace ever obtain the signature of the bank agent, the bank lender's agent, JP Morgan?" "Not to my knowledge."

Grace calls this a hyper-technical argument, or technical argument. You can't bind a creditor unless you have, in fact, bound the creditor, and that never occurred here.

And, again, more on the signature at the bottom of this page, Your Honor, and, again, it was clear concession by Grace that they never obtained a signature binding any debt holder and did not bind the bank lender's agent.

Now, let's talk about -- Mr. Tarola recalls, the interest rates that you recite in response to Mr. Bernick's

questions, those interest rates referenced in the joint plan filed in 2005, do you recall the form of consideration that the joint plan provided? He says, "I don't recall off the of my head." And then Mr. Pasquale prompts him, "Was it all cash?" "You mention, I think, it was part cash, part equity." Mr. Tarola recalls now, 85 percent cash, 15 percent other consideration. A different plan that the Committee was supporting, Your Honor.

I don't want to belabor the point, Your Honor, I'm afraid I have with my -- with the use of this testimony, but I want to make it perfectly clear that Grace knew that it was a different plan. Grace knew that the Committee, at one time, supported a different plan, a different context, that provided different consideration for some of its constituents.

Grace -- I don't think there's any serious dispute, Your Honor, again, based on Kensington, based on Revko, that the Committee cannot bind a single constituent. But, then Grace makes the unsupported argument in its papers that the Committee was acting as the authorized representative of the bank lender. I don't know what that means, Your Honor. They have a fiduciary, a fiduciary obligation to represent all of their constituents. I don't know what authorized representative means. It certainly didn't bind the bank lenders, they can't bind the bank lenders. And Grace goes on to say that as such, the bank lenders and the Committee agreed

to accept a rate of interest that's different than the default rate, as a matter of law, they go on to say.

Your Honor, there's no authority provided in Grace's brief and particularly the most recent brief, the reply brief, for that kind of bold statement. And, Your Honor -- it's very clever, Your Honor, they start there and then that morphs into a scheme whereby the bank lenders, the bank lenders as creditors, were lying in the weeds and are now taking advantage of this settlement.

Once you establish the relationship, as Grace would like you to do, way back in 2005, that relationship, they say, continues and now there's a scheme. We'll talk for a minute about that scheme, if it was a scheme and, in fact, who proposed the scheme.

Curiously, Your Honor, as I noted before, there's no law supported, that supports or a cited in support of the dramatic statement that we were the -- that the Committee was the authorized representative of the bank lenders. No law that supports a finding that the Committee was the bank lender's agent. There's no law that even the bank -- that the administrative agent, JP Morgan Chase and Mr. Maher, had the legal authority to reduce the legal interest rate recoverable under the credit agreement. And, most certainly, Your Honor has never ruled that the Committee was the bank lender's agent and thus bound the bank lenders to accept any reduction.

So, what do we know? We know that under the 2005, 2006 letter agreements, we know that the Committee at one time, may have been obligated to support a political voice, a different plan that paid less than the default rate, but that included an equity component.

Your Honor, I'll note for the record that the stock price of Grace in December and January of 2005, December 2005, January 2006, was trading at about 10 to $12 a share, and Mr. Pasquale just updated the Court with regard to the December 31st trading price at $25 a share. The equity piece had value and that underscores the differences in those proposals.

So, we move forward from the 2005, 2006 letter agreements, different plan, joint plan. Committees had said they would be a vocal supporter of that, no bank lender is bound, the Committee is not acting as the bank lender's agent.

The debtors propose a term sheet and that term sheet is then circulated to the world and within a matter of days, the bank lenders object. There's a letter submitted by Mr. Rosenberg, on behalf of the bank lenders and they object to rate of default interest. Before that time, there was no vehicle or medium for the bank lenders, as creditors, to object to the rate of interest that was being offered. Grace says, well, we put the 6.09 percent in our public filings, we put it in our financial reports. Your Honor, a creditor doesn't have an obligation to come forward and respond to everything the

debtor says about what would be the recovery under a particular creditor's claim. It has an obligation to come forward when that claim is objected to. It has an obligation to come forward when there is a medium and a forum in which to do that. And here, it was the Court, there was the exchange by Mr. Rosenberg, but then there was the claim objection that brought us -- that began this long travail. And when the claim objection was filed, the lenders responded and have vigorously continued to assert, as they have all along, that what they believe was their entitlement to the contract default rate.

Grace knew that it hadn't bound any individual bank lender and, you know, I hesitate, Your Honor, to spend a lot of time on this, but I feel I have to because there's -- Grace is saying that the bank lenders and the Committee acted in a certain way, when we know that Grace knew that they had never bound any bank lender. I don't think they seriously dispute -- they may, I'll hear from Mr. Bernick -- but I don't think they seriously dispute that any bank lender was legally obligated, in any sense, to accept a rate other than the rate they had asserted in their proof of claim.

Let's take a look at some of the evidence that shows that Grace knew that not a single bank lender was obligated to support or accept anything less than the rate they were claiming in the proof of claim.

Cross examination by Mr. Pasquale --

THE COURT: Who is this, I'm sorry?

MR. COBB: This is Mr. Tarola, again, on the stand.

THE COURT: All right.

MR. COBB: We talk about, did he obtain a signature, and, again, Grace concedes, at least through October of 2008, under Mr. Tarola's tenure with Grace, never was there a signature obtained with the bank agent. Mr. Pasquale continues and says -- asks the question, "Did Grace obtain the signature of any bank debt holder on any document by which the bank debt holder agreed to the post-petition interest rate negotiated between you and Mr. Maher on behalf of the Committee?" Again, "Not to my knowledge." Again, no signature from JP Morgan Chase.

The questions continue. "At any point in time, from February of 2006 until, I believe it was October of 2008, did Grace ever obtain a signature?" "No." Then he says, Mr. Tarola says -- it's a remarkable comment, actually -- says, "But I would like to say my understanding of the bankruptcy process was that if individual creditors objected to a proposed plan, that would come out at the time the plan was voted upon, not in some interim period." And Mr. Pasquale moved to strike. I like that answer, Your Honor, because that's exactly what happened here. That's exactly what happened. When the time came for the bank lenders to make certain that they would not lose their rights, they stood up and they objected.

Now, we get into an interesting question that's asked, "Did Grace ever request a separate agreement with JP Morgan Chase to support a plan of reorganization in these cases?" I know Your Honor was very, very, very aware of what a plan support agreement is and Your Honor is aware of what a lot of agreements are, and not once, not once, did Grace approach the bank lenders in an attempt to lock them up. To get a plan support agreement.

There was a draft plan support agreement circulated between Grace and the Committee, it never was executed. They had express carve out, that any individual creditor could, indeed object, if it felt it should, or otherwise needed to object. There never once, in this sophisticated bankruptcy where millions and millions of dollars are at stake, with any, you know, with any delay in the case, with a lengthy confirmation process, that Your Honor knows is an incredible financial commitment, not once did Grace attempt to legally bind the bank lenders, as Your Honor knows that they can do, they didn't even make the attempt. There's no evidence in the record that they did, and you're not going to hear that there was an attempt to that.

Your Honor, the disclosure statement of the plan that was filed in 2005, there's again an acknowledgment, even under 2005, which may be the closest Grace has come to binding anyone with regard to a rate, but we, of course, don't concede that

point, but let's look at -- this is in the footnote, on Page 59 of the 2005 plan disclosure statement, says, "This agreement does not commit any member of the Unsecured Creditors' Committee, or any creditor, to vote for the plan."

Lastly, Your Honor, after the term sheet was issued in 2008, there was a conference call that Grace participated in, a regular conference call, as Your Honor is aware that these exist, where a publicly traded company will have a conference, particularly in bankruptcy, they will update their investors, update their equity holders, update their creditors with regard to what's going on in the company. And here, a conference call is held April 7th, 2008. And we kind of work our way down through the transcript, some of which is redacted at Grace's request, get down to the transcript, and we see Mr. Festa, an officer of Grace at the time, has this to say in response to -- it appears to something that's redacted.

This is Fred, "As you know, our unsecured creditors have been supportive of our plan, as well as co-proponents of our plan, since the last the last three years" -- must be referring to the 2005 plan -- "or over three years, just based on the urgency of getting these documents done. They have really not had a complete chance to look at all the documents and make a recommendation to all of their members."

Okay. So, the term sheet has been issued, the Committee has not voiced its support yet, according to Mr.

Festa, because the Committee has not had a chance to look at it. We anticipate, and more than anticipate, working with them, educating them, the Committee, and hopefully, they'll continue to support us as they have done for the past three years, as we've worked together very closely together as one, the Committee and Grace. No mention of the bank lenders. And, in fact, the Committee has objected. The Committee is standing here before you as a supporter of the bank lender's objection.

So, Grace knew that it hadn't obtained -- that it had not obtained, according to Mr. Festa, they haven't had a chance to look at it yet, they haven't had a chance to make a recommendation, they hadn't obtained the Committee's support when the term sheet was issued for the plan that's before this Court in early 2008.

And Grace knew that the bank lenders were seeking to recover interest at the contract default rate, in order to vote in favor of this plan that's before the Court. How did they know that, Mr. Kruger told them. Mr. Kruger, as counsel for the Committee, communicated to Grace that he was aware that there were bank holders that were looking to recover more than the 6.09 percent interest rate.

Let's start first with Mr. Kruger's testimony on direct. "Did there come a time when Mr. Shelnitz advised you" -- let's step back, I want to make sure the context is correct for the Court. These questions are asked and the setting here

is, and specifically, Your Honor, who suggested, who came up with the idea that the Committee should not participate in the 2008 plan negotiations? Remember now, this is the underpinning of the scheme, that the bank lenders and the Committee talk about a separation there between the Committee and the bank lenders. This is the scheme that the Committee laid in wait, and the bank lenders laid in wait, and then the term sheet comes out and they pounce on it and they file these objections.

Now, Mr. Kruger, there's a question asked by -- on direct by Mr. Pasquale, "Did there come a time when Mr. Shelnitz advised you that the debtors were engaging in settlement discussions with other constituencies in these cases to resolve the personal injury asbestos liability?" "Yes, he did so advise." "If you recall." "He did so advise. Probably the early part of 2008." "Did the Creditors' Committee participate in those negotiations?" "No, we did not." No disagreement there. Grace agrees with that fact.

"We suggested -- I suggested to Mr. Shelnitz, that we should participate in those negotiations and I wanted to be present for them, to set forth a claim for the holders of bank debt, as well as the other claimants in the unsecured creditor community. Mr. Shelnitz thought that he would be able to carry our work, so-to-speak, and that he was going to negotiate a plan with the PI Committee, so we were not invited."

All right. Now, we get into the next scheme, which

is, Mr. Shelnitz knew at the time that he was negotiating with the other constituencies, that the bank debt holders didn't want to receive or recover at the higher rate, the default rate. "During that period of time what, if anything, did you tell Mr. Shelnitz about what you believed to be the expectation of holders of bank debt?" Receive (indiscernible). "I told Mr. -- specific conversation, without date, Mr. Kruger says, "Yes, I can recall a specific conversation in which I informed Mr. Shelnitz, Grace expected to have the bank debt holders vote in favor of any reorganization plan that they might offer, that the plan would need to provide the default interest for the bank debt holders and that in addition to that, but regardless of the view the Committee might hold, the Committee doesn't vote, it would be the bank debt holders that ultimately voted on the plan." "Did you ever tell Mr. Shelnitz that the Committee would support the plan as documented in the April 2008 term sheet?" "No, I did not." Again, the principal communicator between the Committee and Grace.

Not even the Committee had committed to support the 2008 term sheet and, in fact, the Committee was communicating to Grace directly, while negotiations were occurring, that the bank debt holders expected to receive default interest.

Building on that, Your Honor, further questions are asked about what did Grace know. "Now, Mr. Bernick asked you a number of questions," Mr. Pasquale cross examining Mr.

Shelnitz. Let's understand the setting. There's a lot of discussion about separate agreements, let's focus on Line 9, which says, "Mr. Bernick asked you a number of questions," you, being Mr. Shelnitz, "that Mr. Kruger did not tell you. Did Mr. Kruger or anyone at Strook ever tell you that the Committee would support the term sheet or the plan presently before this Court?" "No, but the question was never asked." "Never asked by you in any of the discussions with Mr. Kruger?", Mr. Pasquale asked. "Well, we had discussions," plural, "when he indicated to me that the trading price of the debt indicated there, maybe some bank holders that had an expectation of a higher rate of interest. I recognize that that could be an issue, but that the Committee support would be very powerful in getting the plan confirmed."

Again, bank lenders, Committee, two separate entities. The Committee in only a political voice. "What was your expectation as to the effect of the the Committee's -- oh, excuse me -- "that was your expectation as to the effect of the Committee's support, correct?" And the answer by Mr. Shelnitz was, "Mr. Kruger never took issue with that statement, correct."

Now, Mr. Pasquale says, "Let's stay in the range of April 2008," et cetera, et cetera, and he references April 4, 2008 as the relevant date. And Mr. Pasquale asks, "You were told during the discussions with Strook, during that period of

time, early April 2008, that certain bank debt holders were not agreeable to the rate provided in the term sheet, weren't you?" "I believe so." "So, you knew that before the term sheet was signed?" Mr. Shelnitz, "Yes." "Now with respect to the negotiations that led to the term sheet, Mr. Bernick asked you some questions about the Creditors' Committee. That the Creditors' Committee did not participate in those negotiations. Do you recall the questions?" Back to the issue of the scheme, Your Honor. Answer, "Correct." Question by Mr. Pasquale, "That was actually your decision, wasn't it?" "Well," Mr. Shelnitz says, "it was my position and suggestion to Mr. Kruger, that that would be the best way to get a deal done on that, a more intimate discussion without the general unsecured committee being there. That would be more productive and it would enable the Committee to avoid having to address the asbestos claimants committee directly, with an expectation that the ACC would be requested to take a cut in their recovery in the amount of principal." Okay? But, this is Mr. Shelnitz's suggestion to Mr. Kruger when Mr. Shelnitz knows that there are bank lenders out there that expect a higher rate of interest.

"So it was your, Mr. Shelnitz, strategic decision to which we agreed, isn't that" -- on the next page -- "isn't that right?" "Correct." He knows that the bank lenders weren't going to support it. At least some-- he said, at least on those, that some are not going to support it and it's his

suggestion that the Committee stays home, that the Committee doesn't participate.

Let's look at the bottom of the page, question by Mr. Pasquale, "You mention in response to Mr. Bernick's questions, again it's Mr. Shelnitz, "At least a conversation with Mr. Kruger with respect to trading price of the debt." Again, trading price reflecting that they want more than the rate of 6.09 percent. "In fact, there was more than one conversation wasn't there?" Mr. Pasquale asked Mr. Shelnitz. What does Mr. Shelnitz say? "He did mention it in more than one conversation, yes." Mr. Pasquale says, "Well, it was at least five conversations that you can recall." "That would be a ballpark. It wasn't one time, it wasn't one mention, there were at least five conversations. That's the ballpark. It could have been six or seven, maybe there were three or four, but it was more than once. It was multiple occasions, at least during the course of these negotiations." There was no (indiscernible), they were on notice.

And the effect of the 2008 plan and term sheet on the bank holders. "I believe you have," -- Mr. Shelnitz -- this is the question of Mr. Shelnitz on redirect by Mr. Pasquale, "that Mr. Maher is negotiating this back in 2005, the bank agent would would be binding upon individual bank debt holders." Objection, (indiscernible). "As I said," Mr. Shelnitz responds, "I didn't. I wasn't really focusing on the extent to

which individual bank debt holders may or may not have been bound. Not being a bankruptcy law expert, I really wasn't quite sure to what extent they would or would not be bound."

They have the best bankruptcy law firm in the world working for them. Certainly not my firm. It's in competition with Kirkland Ellis. He had a question, he wasn't really focusing on, he wasn't sure. He could have asked, is there any way we can bind the bank lenders, any one or all of them? He could have asked that question. He's an attorney himself. And working in a sophisticated environment, for a sophisticated client in a very critical time period, where the debtors are about to invest millions and millions and attempt to recover on the millions and millions they've invested in the bankruptcy process, and confirm a plan that hopefully sails through without objection, and he never asks. He never even asked the question and that -- I don't mean to assess blame here, but when they're saying that my clients did something wrong, that our conduct here should somehow be used to detract from the contract default rate which is the correct rate to be recovered here. Let's look at their conduct, what they knew and what they did.

It gets worse, Your Honor. Grace knew also that the bank credit agreements did not allow the bank lender agent to reduce the interest rate, and thus, even Mr. Maher had no authority, on his own, to reduce the interest rate. Let's take

a look at the credit agreement. Section 11.1. Notwithstanding any provision contrary, elsewhere in this agreement, the administrative agent shall not have any duties or responsibilities except those expressly set forth in the agreement. That's 11.1, Your Honor, followed by Section 13.1 which says, "In this agreement?" "No, we have the loan document the terms hereof, they are making measures supplemented and modified, except in accordance with this subsection. With the written consent of the majority banks" -- remember, Grace is a part of this document they know what this document says, or they should. They have a billion dollar loan. I think it's fair to say they can be charge with having responsibility to read it and understand it. "The written consent of the majority banks' administrative agent, the parent, and the company may from time to time enter into written amendments, supplements to modifications hereto in (indiscernible), if any," et cetera, et cetera, et cetera, "provided, however, that no such waiver and no such amendment, supplement or modification shall," Romanette (i), "reduce the amount or extend the maturity of any loan or note, or any installment thereof, or reduce the rate or extend the time of payment of interest thereon. Reduce the rate or extend the time of payment of interest thereon; Credit agreement, Section 13.

They knew that even Mr. Maher himself had he written

on a cocktail napkin, at one of these Committee Grace meetings and said, oh, by the way, we'll take something less. He couldn't bind anyone, he couldn't do it.

Grace knew that the bank debt was trading at a level that demonstrated an expectation that bank debt holders expected to recover default interest. I think that's very clear now.

What I talked about, I think, was Mr. Shelnitz's knowledge in 2008, at around the critical plan negotiation time for this plan, Shelnitz also told on direct from Mr. Bernick that we had discussions on various issue related to bankruptcy, and in one of those discussions somewhere in the spring of 2007 time frame, Mr, Kruger happened to mention that we need to solve the bank debt. Well, he had been advised that the bank debt was trading at a level that indicated some expectation of interest above the accrual rate in the 2006 letter agreement.

Well, there then is -- okay, is there anything else that you recall Mr. Kruger saying? Well, we talked about that and we talked about how thinly the debt was traded, it may not be indicative of anyone's expectations and we really don't know what to make of it.

The question becomes, what does Mr. Shelnitz do in response? Did he pick up a phone and call Mr. Maher? Did he pick up a phone call the agent? Did he pick up a phone any call any individual bank lender? There's no evidence in the

record that he did anything, and that's 2007. And we know that there was ballpark, five discussions about the debt trading at a different level with regard to the interest rate, in 2008. And, again, there's no evidence in the record that Mr. Shelnitz ever attempted to understand where the bank lenders were at, by speaking to a bank lender, who could be bound, who could be bound, legally, to support that interest rate.

Again, I think we've covered -- I think I've made the point, Your Honor. It's throughout the evidence, and I know, Your Honor has been carefully reading the confirmation transcript, but I think that at this point it's fairly clear. And Grace knew in the end that any individual bank lender could object. So, what is the most that Grace really can say about all this?

At some point, under an earlier plan, the Committee thought that 6.09 percent recovery, in a plan where they're paid cash plus an equity kicker, okay, on the recovery of their claim, that that -- the Committee would advocate on behalf of the Committee and all of its constituents that that rate, that recovery, should be accepted by the creditors.

So, Grace knowing all these and let me run down the bullet points, knowing it hadn't bound any bank lender to accept or agree to, or accept less than default rate, knowing that the bank lenders in early 2008 would require default interest at the contract rate, to vote in support of a plan,

knowing that the credit agreements do not allow the bank lenders agent to reduce the interest rate, knowing that at least some Grace bank debt was trading at a level that expected that a higher rate of interest be recovered, knowing that any bank lender could object and represented by Kirkland & Ellis, a very sophisticated restructuring professionals who know exactly how to bind the creditor constituency, they never make the attempt. They just sit there. They don't make the attempt to bind anyone.

In response, Grace plows ahead with this plan and makes a variety of legal arguments and here we are at confirmation, Your Honor. But they have absolutely no right to stand here and say, Your Honor, that we relied on something the bank lenders said or did, we relied on some prior rate of interest in formulating this plan.

They said to Mr. Kruger, no, you know what, Lou, we'll take care of it, we'll carry the water. That was Mr. Shelnitz's suggestion.

Let's close, then, Your Honor, the fair and equitable discussion with, what are the equitable considerations that Grace says this Court should look at in deciding what's the correct rate of interest.

You've heard from me, Your Honor, I believe firmly, and, of course, my clients do, is that we should look to Coram and we should look at the contract default rate and it comes

down from there if you did something bad, to earn yourself less than that rate. Coram, very bad conduct. There's some other factors we point to in our papers. The 2 percent default rate. We don't have to prove that that's reasonable, but, of course, we do. Your Honor has seen a number of facilities where 2 percent is the standard default rate. This isn't 2 percent on top of 16 percent that take it to 18 percent, it's 7.7 percent. That is not usurious on its face. And Grace has apparently -- they appreciate that and that hasn't been a point of emphasis, at least to date, in their papers. There's a risk of non-payment, it's an unsecured obligation, look where we are, there's no better evidence than we're nine, ten years out, excuse me, seven and nine years out, from when the loans matured and we haven't been repaid. There was massive asbestos liabilities on this debtor. The risk of non-payment is self-evident, but Grace focuses on four factors, four considerations that they say, Judge, they shouldn't get their contract default rate.

Now, I'm not sure what argument Grace is positing here. I'm not sure if this is justifying a rate higher than the federal judgment rate, or justifying a rate lower than the contract default rate, but there are four considerations that they put before the Court.

First is the scheme, lots about the scheme. We've been around that. It's a lawyer's argument, it's invented.

Your Honor, they knew what Grace's perception was with regard to what the bank lenders and the Committee were doing or not doing before they entered into those April 2008 negotiations, before they certainly signed the term sheet.

This argument first appears, this bad faith scheme, appears in their reply brief. It was invented, Your Honor, it doesn't exist, Your Honor. Grace suggested that the Committee stay home, never even talked to the bank lenders. I think that argument has been disposed of.

Equitable consideration number two. No default interest should be awarded because impairment has not been proved and solvency has not been established. Interesting. I call this the bootstrapper of all bootstrappers. If we get to this stage, Your Honor, I think you have to determine that they were solvent, I do believe that there needs to be some entitlement under the contract to the rate, I think we've established that, I think there's a little debate remaining in Your Honor's mind, but I think we've established that clearly, but I don't understand that argument in the fair and equitable context. It doesn't make sense. You haven't proven this, but then they should get this. It carries no weight and should be given no consideration by the Court.

Other constituents have compromised their claims. I like this one. This is the bomb that they lobbed way back in the spring of -- in the summer of 2008, where they say, Your

Honor, ohhh, don't do this, it's going to blow it up. And you know what that means, Your Honor, three months, or some lengthy period of time, sitting through an asbestos -- a fight over what the asbestos personal injury liabilities are. And then they rely on two cases, and they talk, really discuss at length one, Manchester Gas, for this proposition. That as other creditors took a haircut, these guys should have to take a haircut, too, Your Honor. Manchester Gas, entirely inapposite. They claim it's square, it's on all fours, it's directly applicable.

Your Honor, the creditor that was complaining about the recovery of interest at a higher rate, the creditor that was complaining failed to object at the confirmation hearing that the solvent debtor was not paying post petition interest, they waived it. They waived the ability to make this argument, Of course, we can't come back in six years -- you know, a year from now or six months from now, post confirmation and say, although the plan didn't provide it, Your Honor, pay us now. That's not what we have here, Your Honor, at all. We have asserted our rights appropriately, we have not waived them and we are asserting them at the correct time, before confirmation.

And, guess what, Your Honor, in Manchester, the debtor was insolvent, the court found, on the effective date. That's not what we submit is occurring here.

And, lastly, the other creditors weren't receiving

any post petition interest. It's not the case here. There is post petition interest, we happen to be the creditor who is standing up and making a stink about it. It doesn't apply at all, Your Honor.

The Titus case was a discussion under 502(b)(2), it was the New Valley issue and they actually -- the court finds it's just entirely inapplicable.

Look, this is hard, Your Honor. I'm -- you know, to look Your Honor in the face and say, Your Honor, if the consequence that occurs is, we got to go all the way back and begin that trial anew, it's going to take up a lot of court time, it's going to cost a lot of money, but the Third Circuit doesn't shy away from overturning decisions that have the effect of disrupting settlements in complex bankruptcy cases. Doesn't shy away from that. It's done it, as we know, we have Armstrong, we've got Combustion Engineering and we've got Owens-Corning. They all teach us that you can't settle around the code.

And, what's happening here, Your Honor, at bottom, Your Honor, is settlement and attempt to avoid the absolute priority rule. That's what -- everybody else has settled Your Honor, they haven't. Everyone one else has taken a discount. At one point, under a different plan, the Committee thought this was a great rate. So, therefore, they should have to settle, you should force them to settle under this plan. It's

not appropriate under the law, Your Honor.

And then lastly, what I'll call the horseshoe and hand grenade argument, it's really close, they're really, really close. Your Honor, they're either entitled to the default rate and then they did something bad, or there's something wrong in what they have done, that suggests that they should receive less it this court of equity, but that's not what happened here, there is no bad conduct, there was no contract they broke, there was no agreement, there was no, even a reasonable right for Grace to rely on anything that the bank lenders did or didn't do.

What's the test, then? If it's close enough? Do we take a dartboard and we line up, I don't know, brake it down in 5 percent increments and we throw the darts at the board and go, hum, that's pretty close. I think that's good enough. That's why Dow and Coram make sense, Your Honor. You have to have a polestar, there has to be touchstone in this examination and we submit that touchstone, when they borrowed our money and have failed to pay it back, maybe they're right under the code, but now when we get to confirmation, what's the correct interest rate? The touchstone has to be something, it's not the federal judgment rate. Didn't exist when the code came into existence, it is not appropriate here. Judge Mary Walrath has found, you only get there if you do something really, really bad. It's the default interest rate under the code,

under the contract. If the contract has no default rate, it's the contract rate, but here we have a default rate and that rate should be applied.

THE COURT: Will you make the same argument if the default rate is less than the federal judgment rate?

MR. COBB: Will I make the same argument if the default rate -- no, Your Honor, I'd make the argument that it's the federal judgment rate. Come on, I'm a lawyer, Your Honor.

THE COURT: I just want to know how --

MR. COBB: I understand, I understand. It's not what we have here, but --

THE COURT: Well, no, you're asking me for an absolute determination that says it's not the federal judgment rate, it's the contract default rate, so I just want to know if that's the argument you really want to advance, that it's always the contract default rate?

MR. COBB: Your Honor, in this situation and in other cases, where the contract default rate -- that's what's brought the issue before the Court, where the contract default rate is higher, federal judgment rate is lower, and there's a debate as to which should apply and does it fall somewhere in between.

Your Honor, you did ask the question some hearings ago about whether Equity is retaining all of its interests, excuse me. How do bank lenders compare, in capacity to other creditors and Equity in this case, how are they fairing? I'm

not so sure, I don't necessarily believe that that is an equitable consideration that should be taken into account here, but, but, if Your Honor is going to do that, Equity is retaining all of its interests here. They not getting less. They're retaining their shares of stock and they've enjoyed a 17 hundred and 43 percent return as of December 31st, since the commencement of these cases. That's a pretty good benefit of the bargain. They bought a share of stock and they got an almost 1800 percent return in that period of time. I know not all of us have been so fortunate in our --

THE COURT: You're saying got a return. You mean their stock has allegedly appreciated in value, not that dividends were paid? What does the turn mean?

MR. COBB: Your Honor, it's an inchoate return, so to speak. They're holding the share in their pocket.

THE COURT: All right.

MR. COBB: But they can pull it out of their pocket and they can sell it, at any time.

THE COURT: Yes, but now it's going to be subject to certain warrants that didn't exist prepetition, too.

MR. COBB: Your Honor, the Equity has done quite well over the course of this bankruptcy, it can't be denied.

And, Your Honor, there was some, you know, reference to, there was a debate over, have the bank lenders hinder this process. Others have objected in the plan context, we have

objected, we're not the sole objector throughout the confirmation, we have done nothing during the course of the cases to slow things down here. They haven't had to pay back the principle. They had the full benefit of the bankruptcy code. They haven't had to pay a cent of interest all along. They've enjoyed that benefit in order to figure out how they want to get out of bankruptcy. They are able to do that now and now is the time to assess the correct rate that should apply.

They haven't had to write a check for half a billion dollars and there's no doubt that that has a tremendous value to an operating company.

In summary, Your Honor, Grace has produced no evidence of any meritorious equitable considerations, let alone compelling ones that justify a reduction in the default rate.

Grace makes one final argument, leaves us with this pithy argument. And I know Mr. Bernick is impatient to get up here. I'm impatient to sit down. But let me close with this, Your Honor. Grace posits its road wary proposition last, that Section 502(d) impairment argument -- it comes back to us in different clothes. Read the last argument in the reply brief, Your Honor. The absolute priority rule is satisfied because Grace is paying the bank lenders allowed claims in full, which need not include any interest, but we're throwing some interest in, Your Honor, so, it has to be fair. The cite the face of

the statute and a single Florida bankruptcy case. I'm not making this up, it's in their papers.

We know, we know that this is New Valley, this is New Valley, it's a New Valley argument. And we know that that argument is absolutely meritless based on the repeal of the amendment to the statute.

It's interesting that they would close their papers with that. I find that the Equity Committee and Coram raised this very argument using 529(d) and they actually cite Coram and they say the Equity Committee asserts that denying post petition interest to the notedholders does not offend the absolutely priority rule because the note requires only payment of the allowed claims.

Judge Walrath says we disagree, she's beyond that and we know that that's not the law any longer, Your Honor. You can't just pay the allowed claim and throw some interest on top of it and say, we've met the fair and equitable test.

There's little dispute at this point, the bank lenders rely on all of the arguments raised in the many, many pleadings filed on their behalf in these cases. By my not mentioning one argument, by my not emphasizing a particular argument doesn't mean we've waived anything, Your Honor. We believe that by offering 6.09 percent interest on the bank debt, Grace concedes that a legally cognizable default occurred post petition and the bank lenders are impaired. So, really

the dispute is, what's the fair and equitable test and how should that be applied here.

We submit the Court should adopt the reasoning in Dow, as given by the Sixth Circuit and the Court should follow Judge Walrath. That is the correct test. We start at a higher rate, at the contract rate and we come down. Confirmation of the plan, unfortunately, should be denied unless it is modified to provide for the correct rate of interest as asserted by the bank lenders. Thank you, Your Honor. Thank you, Mr. Brown.

THE COURT: Anyone else on behalf of the lenders or the Committee? Anyone else on that side of the issue? Okay. Mr. Bernick.

MR. BERNICK: It's 1:20 and I'm just asking the Court whether you want to hear it all now, or --

THE COURT: You want a quick recess?

MR. BERNICK: I could -- I need a very recess, but beyond that, I'm more inquiring about whether --

THE COURT: I figure we'll be done by three. So, I have a cab at three, we'll be finished by three. So, yes, I want --

MR. BERNICK: So, you want to work through and get it done.

THE COURT: Yes.

MR. BERNICK: Okay.

THE COURT: All right.

MR. BERNICK: Just give me five minutes, then.

THE COURT: Yes, we'll take a five minute recess.

(Recess)

COURT CLERK: All rise.

THE COURT: Thank you. Please be seated. Mr. Bernick?

MR. BERNICK: Thank you, Your Honor. I'm going to try to focus as much as I can on the particular points that have been made this morning and not go back over the entire argument that we had last time. Your Honor has now been through this many, many times, albeit, there are many parts of it that probably warrant a lot of examination because they're tricky.

Last time we set up a rubric or a sequence or order of operations for analyzing the various issues that have been raised and I put that back up before Your Honor, that's PPCLO-25, I believe, squinting over there, and we still believe that that is the right order of operations, so I'm going to follow it here this morning.

Beginning with the first step, has there been a default, some significant discussion of that issues here today and the concept of whether, in fact, there is a freeze and whether the freeze does, in fact, still leave some latitude for the debtor to emerge from the freezer compartment and pay post petition interest. And, effectively, the argument that's been

made is that the debtor should have done precisely that, that we should have come forward and paid post petition interest so that we would have remained in compliance with the lenders' view of what the documents required and, therefore, not have been in a position where we had to pay default interest.

Your Honor properly observed that, in fact, the debtor -- the lenders themselves, never asked for that to take place. If they were intent upon getting that money, they certainly could have come forward, but even more right on, as Your Honor's observation, that that request would never have been granted in the context of this case. And the reason it would not have been granted, it's been the position of both the property damage constituency and the personal injury constituency in this case from the very get go, that Grace in going to Chapter 11 was, in fact, insolvent by virtue of the outstanding tort liabilities.

That has been the position of those constituencies, at least the PI constituency in almost every case that has come before Your Honor. They've been at pains to go down that road in every single case and they did so with equal vigor here. So, the idea that somehow we would have been given the ability to come in and actually pay principle to the lenders so as to avoid what they believe would be a default is not just revisionist history, you kind of have to wear the blinders and say, it never, ever happened.

The only example that they've provided where, in fact, principle dollars were paid out, was the EPA and there's a very good reason for that, which is, the matter first was brought before the Court and approval was obtained and it was brought before the Court and approval was obtained with the concurrence of all constituencies, including the personal injury constituency. And why were they focused on doing that? And the answer is, that they thought that the settlement was a favorable settlement and they recognized that Grace could not get a discharge from the environmental liabilities in this case. So, that effectively, the EPA's request for money, which was going to be an ongoing request, their claim extended into the future, as they had to -- or they would assert that they had to do cleanups of various kinds and they would seek reimbursement from the company, it could create a cloud over the reorganized Grace and a cloud over the reorganized Grace would have been contrary to the interests of all of the creditors who were going to be relying, to some extent, on the reorganized Grace to continue to discharge the obligations to the creditors.

So, the EPA was a very unique situation, it was given by the nature of the settlement and by the limitations on the ability under the law to get a complete discharge of the environmental liabilities. Everybody signed on and it was done and that was the only one that was done. So, no way could we

have come forward and done this and as Your Honor properly has recognized, there is not a default when we don't have the ability to go ahead and make the payment.

There are two cases that were discussed by Mr. Cobb, one was the Next Wave case, it had nothing to do with this case. It is true that Next Wave is not a post petition interest case, but that's not the reason that's cited, it's cited for a different proposition. It's cited for the proposition of whether there's a default by virtue of failure to make payments post petition. That's what it's cited for.

In that case, the issue was whether the debtor was going to be subject to a penalty, due to the failure to make post petition payments. The court found no, because the court found that, in fact, there was a freeze, both of principle and interest. It is precisely on point for the principle for which it's cited and the fact that it didn't deal with post petition interest is irrelevant because the issue that we're talking about here, is whether there's been a default.

THE COURT: Well, I mean, Mr. Cobb does make a point, I think, which is that there is still a default, but whether or not there are consequences that should be attributed to that default, may be the analysis that should be applied. The debtor didn't make the payment but, again, I'm sort of stuck between -- with the fact that the debtor couldn't make the payment, so if by operation of law, the debtor is charged with

an impossibility, I'm not sure how that's attributed to a default.

MR. BERNICK: Well, I understand that, but I think that default here is important because default carries with it their argument that says that under the contract they're owed certain things. I think what the bankruptcy code -- this is not a prepetition default situation. The very fact of filing bankruptcy is not a default. The provision in the contract that say that the filing of bankruptcy is a default, is an ipso facto clause that's not enforceable, by virtue of exactly the same act, which is the filing of the bankruptcy, you lose the ability to pay. You also lose, therefore, and this is what Next Wave says, Next Wave says that, essentially, the case comes to a close.

If, in fact, the standard to make payments post petition constituted a default, then the fact that the debtor is in bankruptcy means that it's now taken a step backwards, it's lost a right, or it's incurred an additional liability and that is just as inconsistent with the policies that drive the ipso facto rule, as the ipso facto clauses themselves.

The second case that's been cited is the Dow Corning case. It says, you've got to look to the contract between the parties, you've got to look to the contract between the parties. I'm going to have a significant discussion of the Dow Corning case with respect to why it was that the Dow Corning

case focused on the contract between the parties in a few minutes, so I'll defer that argument.

Next issue was allowability. Again, as we've indicated, if Your Honor were to conclude that there is no default, there's a stop sign there which says that the analysis is over. But going onto the next step in the order of operations, what about allowability?

As we argued to the Court last time, default interest is not allowable under 502, or the exceptions to 503 and we took on both issues, that is whether both the language of 502 and the gloss on 502 that's been provided by the courts, that says that there are a couple of exceptions for the preclusion of post petition interest, we showed that none of those exceptions provide an entitlement to default interest and as you can see on the chart, there are two exceptions. One is the over secured creditor, which doesn't apply and the other is the Section 726 solvency exception which is basically read in by the courts, even outside of the context of Chapter 7. That exception applies where there is, (a) a demonstration of solvency and (b) the federal judgment rate the applies. And what we've demonstrated is, that under no circumstances does that exception extend to the default interest rate.

So, because we've already agreed to pay at least the federal judgment rate, we've complied with 502 and with the exceptions of 502, that doesn't get them to default rate full

stop. The only argument that was made this morning is, and maybe I've been confused and Mr. Cobb will correct me when he stands to respond, is that somehow we can't make that argument unless we demonstrate solvency.

Well, no, what we're saying is that the -- we're not going to require a demonstration of solvency because we're already prepared to pay the federal judgment rate and because of that, the exception is satisfied and as a result, allowed the full amount of the allowed claim or an allowable claim, in fact, will be paid under the plan.

THE COURT: I think the issue is whether the legal rate, which is what 726 says, those are the words, the legal rate, is the federal judgment rate.

MR. BERNICK: I understand that.

THE COURT: And Mr. Cobb argues not, you argue it is.

MR. BERNICK: Right. And I'm not addressing that, it's addressed in the papers and we'll rest on the papers in that regard.

We then go to the next step which is, is there impairment and this is a difficult area, in part because the impairment concept is a difficult one to understand and, in part, because the cases don't necessarily grapple with the issue of impairment before they waltz off to 1129 land. And, I want to spend a little bit of time on it here.

What we argued before and we're still arguing today,

is that there's a logic to the structure of the code and that to the extent that the code says, here is what is allowable and sets limitations, that there are limitations on what's allowable, it would be illogical to have the code then say, well, if you apply those limitations and follow them, that is the limitations that come out in the code, there's still impairment. And so, people then get to argue, based upon the fact that they'll vote against the plan, that they're entitled to the broader entitlements or their entitled to invoke the broader standards of 1129.

If you actually said that impairment is tailored not to 502 and allowability, but instead to 1129 and the tests under 1129, you're effectively saying that in any case where the debtor actually follows the limitations that are imposed by allowability, it is inevitable that the plan is going to be -- that there's going to be a dissent in class and it's inevitable, therefore, that the 1129 standards will apply. And if that's true, what's the point of having the limitations under 502? And that basic recognition that there has to be harmony within the structure of the code is at the heart of the PPIE decision.

It says that if the right, and that's the language that 1124(1) uses, if there is a right that is compromised, but not by virtue of the law, instead by virtue of the plan, then there's impairment. It recognizes that the law can, in fact,

impose limitations and one principle of that law is, in fact, the bankruptcy code itself. The bankruptcy code is a statutory authority, is a statutory limitation, just like any other statutory limitation and, indeed, the PPIE court was explicit in pointing this out. That there are environmental laws that still govern, there are the laws against usury that still govern and to the extent that those laws impose limitations, they do not create impairment.

In here, it is very important that the law that imposes limitation is the code itself. So, that the analysis in PPIE recognizes and harmonizes these two different parts of the code and it says that to the extent that 502, including its exceptions, create a limitation, that is not impairment as a function of the plan, it's impairment as a function of the law.

The analysis is then set forth in the second part of PPIE, which deals with default interest, is totally in harmony with the first part of PPIE. That is to say, the second takes up the question of whether when it comes to default interest -- not default interest, but post petition interest, it asks the question, well, has Congress acted with respect to the code in a way that says that post petition interest must be paid. And the answer is yes. It repealed 1124(3) and it repealed that provision in order to basically deal with the problem that arose as a result of the New Valley decision.

The reason I focus on that is that it's an act of

Congress, it is a change to the statute by virtue of an act of Congress. And that is totally germane with the structure and approach that the court follows in the first part of PPIE. The first part of PPIE says, it's the limitation of function of law. If it's function of law rather than the plan, it's not impairment.

The second part of PPIE says, with respect to post petition interest, what is Congress -- has Congress acted in a way that says that post petition interest should or should not be paid and it says that it has acted in a way that says post petition interest should be paid. So, to that extent, it cuts back somewhat on 502 and the exceptions to 502 as Congress had the right to do.

The issue then is, in the second part of PPIE, was Congress' action construed to somehow say not only are we allowing post petition interest, but we're allowing default interest and the answer is, of course, not. Congress didn't speak to default interest, the Third Circuit in PPIE did not say that Congress had spoken to default interest. So, there is no language, there's no holding, there's no finding in the second part of PPIE that somehow says that Congress has pulled back under 502, to the extent of default interest. Can't find it there.

Mr. Cobb then raises the argument that's yet a little bit layer lower, it's a little bit more refined and I'll deal

with that as well. Did Congress in the repeal of 1124(3), engage in an action, take action that extended 502, that is, the exceptions to 502, because the exceptions to 502 are built into allowability. And, just so that at least I can be clear on some of these distinctions, I'll write it right upon the board.

Congress, in repealing 1124(3) says that there is effectively going to be impairment, if there is not the ability to recover post petition interest. And that is the analysis that PPIE goes through.

The question then is, does that actually change, insofar as allowability of post petition interest is concerned. The scope of allowability. Mr. Cobb says, yes, it changed the scope of allowability. He did this in the context of the absolute priority rule argument that he made at the end, and says, we used allowability under the absolute priority rule to effectively accomplish what New Valley did and what Congress says we couldn't do. And the answer to that is, that's completely wrong, because already built into allowability, under 502, are the exceptions to 502, and those exceptions include post petition interest, under 726.

So, that if there's solvency, yes, under the exception to 502, recognized by the courts and saying there is allowability for post petition interest, in that exception, post petition interest comes in.

When Congress comes out and says, 1124(3) is repealed, in order to respond to New Valley, it does no damage to, does not limit allowability at all, because allowability of post petition interest already was permitted as an exception to 502.

So, the mesh of 502 and its exceptions, with the limitations imposed by law and, therefore, non-impairment, and with the PPIE decision, are entirely consistent. And the only consequence that would accrue to an argument that somehow we've misconstrued PPIE, is to say that the Third Circuit itself misconstrued PPIE, that what it did in the second section of PPIE, was different from the rule that it adopted in the first provision of PPIE.

So, the only way to reconcile the analysis of impairment by law in PPIE, with the second section of PPIE, and with 502, is to recognize that post petition interest was always allowable under the 726 exception to 502 and because it was always allowable, if it was not provided for in the plan, it would be impairment under the plan. If it is provided for in the plan, it is not a limitation, the failure -- to provide for default interest is not an impairment to the plan, is an impairment by law and, therefore, there's no impairment. So, there's a complete consistency between allowability under the exception to 502, PPIE first section, PPIE second section, and the repeal by Congress. All of them contemplate that there

will be post petition interest, none of the contemplate that there will be post petition interest at the default rate.

And so, we get all the way across the board, allowability of post petition interest, we've satisfied that, is there impairment under PPIE, no, there is not. Is there any inconsistency with the repeal of 1124(3), no, there is not.

Now, the only way that counsel for the lenders say that, well, that's just not right, that there has to be an ability to get beyond the federal judgment rate. The only way that they say to get beyond the federal judgment rate, there has to be a default rate, is to argue that, well, we can't regard the federal judgment rate as an absolute cap. And that idea was rejected in the Coram case, rejected in the Coram case. Because, effectively, taking a step back, it is true that if 502 and its exceptions only get you to the federal judgment rate and we're correct that PPIE says that the limitation to the federal judgment rate, if it occurs by statute as it does, is not impairment then, in fact, you can't get a higher rate under 1129 in the fair and equitable test because if you're not impaired, you don't get to vote and if you don't get to vote, you're not in 1129.

So, Mr. Cobb says, well, that's just not right. The federal judgment rate is not a cap, that we have to be able to get beyond the federal judgment rate and to the fair and equitable test. So, he puts the issue out on the table by

saying, gosh, there's got to be a way to break the cap, even though the cap is simply a function of 502 and its exceptions, plus the impairment analysis under 1124(1) and PPIE. So, he comes to the Coram case.

Now, what I want to observe about, and come to the Coram case on its terms in just a moment, but I just want to emphasize to the Court effectively, what all this means.

(Pause)

So, we have allowability, including its exceptions and that takes you up to the federal judgment rate. We have impairment and under PPIE, PPIE says that this limitation that's imposed by allowability, carries forward and is not impairment. This part here is not impairment, if you stay within its bounds.

In order to get above the federal judgment rate and into default, the lenders want to be able to invoke fair and equitable. And they say that they should be entitled to invoke fair and equitable, and their first argument was the repeal. And we've now demonstrated that the repeal was actually completely consistent, because it permits the payment of post petition interest which is what New Valley (indiscernible).

The problem, of course, is then if they now go to fair and equitable, how can they go to fair and equitable if there's no impairment? And the answer is, that they can't. And in fact, to even argue that they can does two things.

First of all, it's entirely circular. If, in fact, there was impairment under PPIE or any of the precedents, unless the fair and equitable test was met, then that's a -- it's a totally circular argument. That is, you can't find out whether there's impairment until you determine that there's fair -- that the treatment is fair and equitable or not fair and equitable, in which case you then find out that there is or is not impairment, so that you get to that test. And that's the argument that we made last time and it's just basic -- it's basic circularity and there's no way around it.

More profoundly, what is the other affect of adopting this argument? If you adopt this argument, Your Honor, what they're basically asking you to do, is to find that in order to say that the federal judgment rate is not a cap, fair and equitable, they're entitled to get fair and equitable, even absent a demonstration that the claim is allowable, even absent a demonstration that there is plan impairment, the effect of allowing them to invoke the fair and equitable test (indiscernible) that you simultaneously wipe out PPIE and the entire impairment doctrine, and you wipe out the limitations of allowability. Because as soon as you let them get to fair and equitable, without the impairment analysis, it's kind of -- you never stop. You just -- you forget about allowability and 502, forget about the exceptions to 502, forget about legal versus plan impairment, forget about all that. Forget about PPIE,

they simply say, well, get us fair and equitable, it is a dramatic, dramatic move. It says, basically what -- I think that they always wanted to say, but can't reconcile with the code, they say, gee, you know, we're different. That Equity can't get a dime unless we're paid default interest, which effectively means that the entirety of the bankruptcy is ignored and you go to the pre-bankruptcy contract. It is as if this never happened. The whoel bankruptcy never happened. We just ignore the fact that it ever occurred.

And, what's very interesting is, you can't do that. We're still here and we're bound to follow the terms of the bankruptcy and, in fact, it's very apt because the PPIE court, the Third Circuit, observed, said, well, Mr. Solo might have been entitled to more if he had managed to recover on his claims before the bankruptcy was filed. And that's what the Third Circuit says, in black and white. If we weren't in bankruptcy, maybe he would have done better, but we're in bankruptcy so, you don't do as well and you don't wipe away the bankruptcy and return to the pre-bankruptcy contract.

Well, in service of these dramatic moves, to escape the cap, they cite one case which is the Coram case. And Coram is interesting because the totality of the discussion in the Coram decision, of this cap concept, appears at 3 -- I'm not sure exactly, but that's 346.

It says, let's zoom it, it says the Equity Committee

suggests that our analysis end at this point and if we conclude that the noteholders are entitled to post petition interest, that it be allowed only at the federal judgment rate. This is rejected -- Judge Walrath says "However we are not convinced that Congress had intended to supplant a party's contractual right, to interest in all circumstances under Chapter 11."

Now, that is a very broad proposition. All circumstances under Chapter 11. And, the citations are to Dow, and for Schoenberg (phonetic). Actually, the Dow case is a bankruptcy court decision, and not a Court of Appeals decision and we have Schoenberg. Neither one of those cases goes through the impairments. (Indiscernible) what we're talking about here is do you get to fair and equitable if there is impairment only as a function of law. That's the issue. And that issue is not addressed by any of these cases.

So, this is a situation where Judge Walrath, basically -- she doesn't address the impairment issue either. She says, oh well, there ought to e circumstances under which you should be able to do better. She doesn't take a look at impairment, Dow Corning doesn't take a look at impairment and Schoenberg doesn't look at impairment.

Now, I'll explain to the Court why Dow Corning didn't look at impairment in a little bit, but this case and (indiscernible) they want this huge proposition that deals away with this careful tailoring of impairment to allowability, and

then ultimately, to the ability to invoke fair and equitable. They want to trash it all and serve as the proposition, that the federal judgment rate is not a cap on the basis of Coram and Coram doesn't even address the very principle that stands in their way. Neither does Dow Corning, neither does Schoenberg.

So, the only law that actually exists with respect to this issue is the law of impairment and the law of impairment in PPIE, that is the law. It is that that articulated the principle that we're talking about here. And Judge Walrath didn't address it. I don't even know if PPIE had been decided by the time of Judge Walrath's decision, although I'm sure that somebody here will tell me, in half a heartbeat, whether that is true.

So, we believe, Your Honor, that today, as we sit here, that impairment is a critical, critical step, along the logical path, the architecture of the code. The impairment matter has to be taken very seriously, and the lenders are arguing to the end of the road here, without actually going through the steps of showing that they're entitled to get to the end of the road, to the fair and equitable requirement.

Let me talk a little bit, then, about the default interest -- I'm sorry, the fair and equitable test, and touch on solvency and then I'll talk about the factors that we believe should drive the fair and equitable analysis.

Again, there's a big stop sign before you get there. If Your Honor doesn't find default, stop sign. If you don't find that there is allowability of default interest, stop sign, another one with respect to impairment. But let's get through that and talk about solvency itself and these are Mr. Pasquale's very thoughtful remarks to the Court.

First I want to dispose -- address a few preliminary matters that I think are not the central issue that he raised, but that should be responded to.

The issue that he raised is, you know, the legal issue of, as of what point in time you determine whether there's solvency. It's not just a point in time, it is on the basis of what facts you determine solvency. Everybody says effective date, but that's always the ambiguity, is that yes, the effective date, but is it with or without giving effectiveness to the plan. Your Honor talks about it as a millisecond, but it's really a matter of principle, which is, are you measuring solvency without considering that the plan is going to be effectuated, or do you measure it after giving effect to the plan.

Mr. Pasquale says, well, we're asking the Court to ignore the terms of the plan. We're not asking the Court to do any such thing. In fact, we're asking the Court to approve the rate of post petition interest that's actually provided for by the plan. The issue is not ignoring the plan, the issue is

whether in determining a predicate fact, which is solvency, to a legal issue, that the Court must address in approving the plan, whether you give effect to the plan. It's not -- you don't read the plan and say, oh, the plan tells me the answer to an issue of law. It's not going to tell you an answer to the issue of law because the issue of law stands over the plan and says, do you consider the affect of the plan in determining whether the plan is in compliance with the law. The idea of the looking at the plan or not is not the issue at all.

He then says, well, Grace has taken the position that the asbestos liabilities were not, in fact, resolved, and he says, well, that's just not -- this is Mr. Pasquale -- he says, that's not true, they were resolve and there's a citation to the testimony of Ms. Zilly where she uses the word resolved. And that's kind of a little bit curious about how out of the middle of nowhere in that answer, did Ms. Zilly happen to use the word resolve. And then I realized, Mr. Cobb used that word in asking the question of Ms. Zilly. So, Mr. Cobb asked the question saying, resolve, very deliberately, and very skillfully, in order to bring out on cross examination testimony that these claims were resolved, so he could make exactly the argument here that he made.

THE COURT: But she said yes.

MR. BERNICK: She said yes. She said yes to an ambiguous question.

THE COURT: Well --

MR. BERNICK: Well, it is an ambiguous question. Sure they're resolved in the sense that after the company, under the plan, under the plan goes effective, there aren't going to be any asbestos tort liabilities, they don't exist. There is, rather, a contractual obligation called the plan of reorganization which supplants all the asbestos liabilities.

So, if you're asking the question of solvency, before giving effect to the plan, that all the liabilities that we're talking about here are tort liabilities. Those tort liabilities were never resolved in the sense that anything was done to quantify how big they were, which is the issue if you're determining solvency is, how big is the liability. It's all tort liability and the amount of that liability was precisely what was at issue and that was never resolved, the whole purpose of the settlement was to forestall the necessity of actually getting a determination about what the scope of the asbestos tort liability was. It's a settlement. A settlement is not evidentiary of the scope of the liability. It displaces the liability. That's true in tort litigation of any kind. That's what we went through in connection with the estimation process, Your Honor. Is that a settlement under 408 is not an indicator, under Rule 408, is not an indicator of the scope of the tort liability, it's just the opposite. It's an agreement that says, here's what we're going to agree to do instead of

getting a resolution on what the actual asbestos liability is. The competing estimates that Your Honor got, dramatically different. Those weren't competing estimates that says, here's what that plan is going to provide, they were competing estimates about what the tort liability was.

So, Ms. Zilly did answer the question, but the question did not inform her, wasn't accurately put to her, saying, does the settlement actually determine the scope of the tort liability, resolve the estimation in favor of an estimate of the tort liability. Of course, the answer to that is no, we decided not to do that.

The next preliminary point that was made, or I won't say preliminary, but not central, but important, he says, well, you know why -- this whole issue could have been obviated if we simply had done -- come to court and asked for approval of the personal injury settlement sooner. So, why didn't we do it sooner? And, the answer is, because the personal injury settlement was this huge, huge, the dominant piece in the case, we couldn't reach resolution of that without attaching to that settlement, all the other financial burdens and obligations that the company would have. That was dropped in as a critical last piece on the assumption that everything else was going to work out so that there was enough money to pay the piper and still have a strong Dow Corning post confirmation. And that's why it had to be saved to the end, we failed on the global

efforts to resolve the whole case, we then went non-global, step by step, put them all in place, dropped this one in with a very important hook which said that the post petition interest cannot exceed the amount that was set forth, in fact, in the plan which was derived from the history.

So, there's a very, very good reason why it was dropped in the beginning, only could be obtained if we had that drop-in at the end. But as Mr Freedman ably pointed out to me, and we apologize for the sidebar discussions, there's a further fundamental problem, which is, you couldn't do a settlement of the personal injury liability under 9019, you need 524(g). It happens at the end of the day, as a matter of law, in asbestos cases.

THE COURT: Mr. Bernick, you really don't need to spend any time on this issue. The only thing I was suggesting, I think, is that even if I accepted that proposition for purposes of that argument, I was still trying to figure out how the debtor, without the plan, would pay that liability.

MR. BERNICK: Yes, fair enough. So, we then come to the main argument, which is that Grace takes the position that solvency should be determined without giving affect to the plan and in doing that, cites no law, no law.

Now, the first thing is that, to be fair to Mr. Pasquale, he kind of said, when he said that, other than the code, or something about the architecture of the code, well,

that's a pretty deep caveat, because point in fact, that's the whole deal. The only treatment of this issue that can be reconciled with the structure of the code, Congress' intent here and Congress' actual provision, and this is PPCL-029, is, in fact, exactly what we're arguing here. That giving effect to the plan is completely inconsistent with all of these other code provisions and Your Honor referred to them yourself in some of the remarks that you had to make, I'm not going to go back over them, but to say, well other than the code, the debtor doesn't cite anything, well, that's, you know, the question is what does the code say?

Next, there's a citation to the Coram Healthcare case again, and Mr. Pasquale says, well, very important that the court there did a valuation and in considering the value of the debtor, did bring to bear, in the valuation, the value of claims that were settled through the plan. And, therefore, the argument is made that the Coram court, by looking at asset value, by considering in part the settlement that was effectuated by the plan, in a sense blessed, looking at the solvency issue with the benefit of the plan. And, there are two critical, critical things.

First of all, that valuation was done, really, for a totally different purpose. In that plan, the noteholders were going to get all the equity and the question was then, is their claim -- are they getting too much for their claim. And, as

consequence, the court had to value the estate in order to determine whether by giving them all the equity, they were being overpaid. So, the original purpose for this valuation was totally different.

But more critically, or as critically, in Coram Healthcare, the court was careful to say that in connection with the valuation itself, there was no evidence that was provided by anybody else that disputed -- on the basis of which the court could make a determination at all. And this was actually the language that was on the screen but not indicated by Mr. Pasquale. It says, in the absence of credible proof of damages by the Equity, we are left with the value that the trustee and noteholders had put on the claims. The 56 million the noteholders will pay to get release of the claim.

So, it was really, the court was having to address and issue about whether the noteholders were being overpaid, had to then do a valuation, and essentially had nothing to go on, other than the resolution through the plan. This case is exactly the opposite. In this case, the pre-effective date, solvency determination, hinges upon the -- not only the value of Grace pre-plan, but on the quantification of the asbestos liabilities.

With respect to those liabilities, there is enormous record of evidence about what those liabilities were. So, this is not a situation where the Court only had a settlement taking

place in the plan to indicate what the solvency analysis would look like, this is a case, our case is one where in contrast to Coram, there's an abundance of evidence, unfortunately, disputed evidence about what the scope of the liability was. So, Coram stands for the proposition only under the particular facts, where there simply was no proof about what the value of this claim was, other than what was set forth in the plan. So, Coram does not help the analysis.

We then have the code, we don't have Coram, we have other case that's very instructive and it's in our briefs, and that is the Valley View decision. In Valley View, in Valley View, effective date without give effect to the plan, there was insolvency. Court awards no post petition interest.

Now, if the plaintiffs were -- I'm sorry, if the lenders were correct, this -- you'd have to say, oh, wait a minute, what about after the plan? After the plan was there solvency? And the answer was, yes. And on the basis of that, the evidence of that is that the court determined that the plan was feasible. This is exactly right. Instead of having the same test for solvency, for interest purpose, as feasibility, you have a different test. For feasibility, look to solvency and the ability to pay, given the plan. For purposes of determining whether there is solvency for interest purposes, you look to without giving effect to the plan. That's exactly what the court did, found that there was insolvency and no post

petition interest. Valley View got it right. But separate and apart from Valley View, it all comes back to the code.

Mr. Pasquale talked about certain factual matters, very limited, so my remarks here will also be very limited. Say, well, really, the facts are completely undisputed when it comes to solvency and we would essentially agree with that, that the issue, the only issue that's been raised is an issue of law about whether you give affect to the plan or not in determining where to go.

But once that issue is resolved, if it's without plan versus with plan, Mr. Frezza was over here. He only talked about -- all of his analyses, asset value, liabilities were all done on a pro forma basis. And pro forma gave effect to the plan. Mr. Frezza has no analysis that he submitted as part of his testimony, on behalf of the lenders, that says without giving effect to the plan, that there was solvency.

Indeed, on cross examination, he says, I don't know how anyone could say that there was solvency because of the dispute. And that is exactly what Ms. Zilly said, as part of her examination, no way to determine solvency, you can't say solvency because of the disputed liabilities. And, therefore, as we sit here, yes, the undisputed record is, that without giving effect to the plan, there is no proof of solvency. That is exactly where we are.

The only further piece of information that Mr.

Pasquale pointed out and I think is probably for purposes of, basically, underscoring that, gee, Equity is doing well in this case, according to the lenders, is talk about the market cap of W.R. Grace as of the end of last year. That's a throwaway, we know it's a throwaway, why is it a throwaway, because the market cap is what the stock is trading for. Obviously, the big elephant in the room is, what happens with the plan.

And so, maybe the stock market is betting that the plan will be approved. If the stock market is not betting that the plan will be approved, it's kind of strange to see that people are willing to pay all this money for stock. That stock is being priced in the marketplace, on the basis of expectations, just like all stock transactions and the big expectation that's at issue here is with respect to the plan. And we all know that Mr. Ordway testified that -- he couldn't even determine, he says -- "Equity value that a stock price can reflect many, many things other than company performance." Answer: "Correct." Question: "And, in fact, you provide no methodology in your declaration here that enables us to relate stock price to actual company performance." Boy, is that true here, he certainly admitted it there. The truth (indiscernible) the eve of being able to emerge. This is Ordway's deposition, August 29, '08, Page 31. It is in our brief.

That then brings me to the last issue, Your Honor,

which is, well, what happens with respect to the balance of the analysis under 1129. And, again, we don't reach that if there isn't a demonstration of solvency, without giving effect to the plan, but we hit another stop sign there, but we addressed that anyhow.

And I want to review just to be clear on exactly what our factors are that says that what we have here in this plan is fair and equitable. And I want to underscore to Your Honor, the fact that in the plan that we ultimately did file, we filed this plan long after the agreement in principle was reached and long after we were told that the lenders were not agreeable to that rate of interest.

We, instead of taking that rats of interest off the table, in litigating, you know, all the way down to the edge and saying, they don't get any post petition interest and then leaving it up to Your Honor to say, well, I don't know how --we didn't step back from where we were. We specifically filed the plan because we thought that was a fair rate of interest and because we thought it was a fair rate of interest, we weren't going to ask Your Honor to somehow give us the benefit of what we thought the law provided us, which is simply paying zero in the way of post petition interest.

So, now, what's happened, of course, is that we put in the plan, and it's never enough, they want more. Their argument with respect to fair and equitable, I think, are

pretty easy to determine here, but the factors that we're reciting in support of the idea that it's fair and equitable, are first of all these. That the rate that's in the plan is the same, is that that was endorsed by the lenders prepetition. Not prepetition, pre-plan.

They make a big deal about the fact that somehow the letter agreements that picked that rate initially, or led up to that rate, are somehow not binding on all the lenders, it's not a contract and this, that and the other, et cetera, et cetera.

We, in fact, thought we were dealing with the Committee, and that the Committee represented the lenders. That's what Grace thought during this period of time. But in connection with the fair and equitable analysis, we don't have to prove that it was a binding contract. We're simply saying, where did the rate come from? It was actually selected by the lenders, came from Mr. Maher and it was endorsed by their Committee and that is evidentiary of fairness and equity and I don't think that there is any doubt but that those facts are true. It was selected by him, it was endorsed by the Committee.

Number two is, it recognizes the solvency problem. Effectively, it's at a level, and this is PPCL-028, it says, you know, it's not the bottom, it's not the top, indeed, it's fairly close to the top but that is, it is somewhere in between because solvency is, by far, is far from clear on this case.

So, again, it's a lock and key fit, in relationship to the solvency problem.

Number three is, it produces for the lenders, high return on their claim. Now, what people negotiate in a bankruptcy court is, or in any piece of litigation, really, over a claim is, what are they claiming, what can they get and what are they prepared -- what did they lose and where are they prepared to settle in between? They don't negotiate, you don't say, well, gee, you know, I can get X, Y, Z in the market, maybe right now, but although X, Y, Z in the market may change tomorrow or the next day or the next day and, therefore, you should settle with me on the basis of what the market says the price is. And, say, well, I'm sorry, you've got a claim in court, you can win or lose the claim in court, regardless of where the market it. So, the market changes. Enormous fluctuation. Stock has gone down to 4, that's right, it's gone up to 26 whatever, and it's gone back down.

Interestingly, the bank debt also at a certain point traded substantially below face value, that is, is a discount to principle. They also got a return, depending upon where they invest in the marketplace.

But the issue is, what was the claim and what is the recovery on the claim. And, as we indicated last time, PPCL-040, the banks, actually in relation to their claims, are doing extremely well in this case. People basically have

pretty much said, oh, well, you know, that's interesting, let's try to do well by the lenders. Again, that's not at issue in this case, as opposed to the asbestos PI claimants, and for that matter, Equity. Equity was entitled to litigate the issue and Grace did litigate the issue of, well, what was the estimate really worth and we felt that the estimate of the value of the PI claims was much lower than the PI constituency did. If that had been successful, Equity would have gotten an awful lot more, but there was a compromise there as well.

And, that then brings me to this next point here. Which is, that to get to where we are today, everyone has sacrificed. They've all taken a haircut.

And then there's the essence of the Manchester case. The essence of the Manchester case is, it's a situation where the court recognized the reason that you got to where you are, is because of the fact that everybody took a hit.

THE COURT: What did Equity take a hit -- how did Equity take a hit?

MR. BERNICK: Let's see. I'm not sure that Equity did take --

THE COURT: Not in Manchester, here in this case.

MR. BERNICK: Oh, in this case. Well, is that Equity gave up the right to continue to litigate. It's what the claim -- well, no, Your Honor, the estimation was hotly contested and Equity -- the position of Equity was the $430 million to $821

million and where was PI? They were at a much lower value. That, effectively, if, in fact, the Equity would have realized if that number had turned out to be true, then the total return to Equity would have been over two, to two and a half billion dollars. And I have to tell Your Honor, that as you know, there were huge legal reasons why -- as well as factual reasons, why their position was the better position, including very, very simply, that there was a complete crossing of the ships at night. The entirety of the PI asbestos estimate as driven by settlements, which were subject to Rule 408. How are they ever, ever going to get around that issue?

Now, Equity had a problem, too, which is how they get out of Chapter 11 without the acquiescence of the PI asbestos claimants and that's what the real give and take was. Everybody ended up with a compromise because the dynamic was that PI couldn't demonstrate the actual value of their claims under 502 as allowable claims. What they really had was as leverage, was the ability to hold up the ability of Equity to get out of Chapter 11. Equity, by contrast, had the ability to demonstrate what the value of the claims really was, but they couldn't get out of Chapter 11 either.

So, in point of fact, the negotiation was all about the value of the estimate and who had the ability to demonstrate what the estimate was, as well as closure to the Chapter 11 case. That's a position of enormous leverage on

both sides. Everybody stood down from their positions.

The asbestos claimants didn't come in and say, oh well, gee, it's okay if walk away for 25 to 35 cents on the dollar because they thought they were being good guys, they did that because they were under circumstances where they had real, real problems and they recognized that. And, therefore, all constituencies took a compromised position in order to get this case done with. And if that had not taken place, we'd still be here wondering what the estimate would be and what the ramifications of the estimate would be. There's absolutely no other way to get to the finish line. So, this is a case where, in fact, there has been a sacrifice by everybody and in the Manchester case, Mr. Cobb made the argument that, well, there's a waiver there, these people were way late.

Well, in point of fact, the analysis and the argument, the analysis that takes place in Manchester, that appears in the last paragraph, doesn't deal with waiver at all. It says it's not equitable. It says that the only reason that there was solvency in this case, was that everybody was in the -- everybody was pitching into a global settlement that, in fact, resolved all the differences, just like as happened in connection with this plan.

And then we come to the Titus case. And the Titus case is a powerful, powerful case. And the Titus case also deals with the issue of sacrifice, but it also deals with the

question of whether somehow the claimant wanted to do better than everybody else. And that's exactly what we have here. We have a claimant that wants to do better than everybody else. And, in Titus the court said, no, I'm sorry, the whole idea of doing equity is not to create an element of unfairness.

(Indiscernible) claimant differently than all the creditors having a lot of general unsecured claims would be inequitable. Equity, we believe, would not condone such disparate treatment of creditors having a lot of general unsecured claims. The portion of (Indiscernible) claim for post petition interest, therefore, must be denied.

Now, why is that, not only is it true that these creditors would be doing even better, you then have to ask well, why are the doing better and the answer is pretty simple. And that is that they, in fact, were the squeaky wheel at the end of the day. They held back, they didn't come forward. You can say that, you know, Mr. Cobb can say, oh, well everybody, did everything right, it was all above board, but the fact of the matter is, that they did have a strategy that says, we're not going to emerge, we're doing all right. And, in fact, at the time that all this happened, there was pressure. The whole idea of the global settlement was, that the asbestos claimants wanted these people to take a haircut on principle. They wanted them to stay out of that fray, that was their strategy, let's stay out of that fray. When it came to the negotiations

themselves, they could easily have picked up the phone and called Mr. Shelnitz and said, we want to be involved and they decided not to do that. That wasn't in their interest to actually emerge. Even when the term sheet was produced and Ms. Krieger's e-mail was sent. This is Plan Proponents 284. Again, they didn't say that they were waling away. This doesn't have be nefarious conduct, it doesn't have to be bad conduct, but the fact of the matter is, that the bank lenders want to do absolutely better than everybody else and their way of doing it was to stay out of the ugly fighting and then come in at the end and hold up this plan with their request for interest. That is very, very similar to the circumstances that we have in the Titus case.

I then come to what is it on the other side. What is on the other side of the equation, what did they say? Well, first of all, we know, and there's no way around it, that there will be a penalty. They're essentially arguing for a penalty, that is because we were in Chapter 11 there's default and there's default interest and we have to pay that. They say, that is the rule of Dow Corning, and that is the absolute priority rule.

Let me just deal with the last. On the absolute priority rule, they say well, all we've come up with is a single case, some Florida case, and we're doing that to basically invoke 502 and New Valley, now by way of the absolute

priority rule. Well, the first thing is, is that as we've already explored with the Court, New Valley and the repeal of 1124(3), is completely consistent with our analysis which shows that you do get post petition interest, it is not a mandate for default post petition interest. So, all that argument we've already dealt with.

But, there's a further point, which is that this construction of the absolute priority rule which says, as the code says, let's put it up here, couldn't be clearer, this is the language of the code. With respect to a class of unsecured creditors, sub-one, or Romanette I, the plan provides that each holder of a claim of such class receive or retain an amount of such complained property or value as of the effective date of the claim, equal to the allowed amount. This is no our invention, it's just the plain language of the code and there's a citation to a Florida case. Colliers, itself, just reads this out in black and white, it's not complex.

But if you take a look, then, at what the effect is of this reading of the code, once again, it is completely consistent. The absolute priority rule, which is applied in confirmation. Absolute priority rule. Our reading of the absolute priority rule puts it completely in harmony with all the other provisions. Allowability has limitations. They are not changed by impairment because impairment, by law, is not impairment by a claimant.

Fair and equitable doesn't produce a different result and the absolute priority rule doesn't produce a different result but it's also pegged to the allowed amount. The whole code hangs together, completely, consistently with this reading of the absolute priority rule. A reading which actually comes right from the face of the code itself. And the absolute priority rule then says, well, they say, well, gee, doesn't that mean that, really, the banks are ending up being last in line, whereas Equity should be last in line. And I want to take that on for half a second because that's the essence of the problem.

There is somebody who is further down in line than Equity and who is it? It is people who have no legal right to recover on their claim. There are all kinds of people, actually, that had no recovery on their claim in this case because the Court has found it's not allowable. And to the extent that the lenders here are seeking something that the code says they don't get, yes, they are even further last in line than Equity. That brings me, then, to the Dow case, which is the other case that they've cited. Another principle that cite on this question of fair and equitable.

They say again and again, that the Dow Corning, Sixth Circuit decision creates the right touchstone, which is the contract. And, again and again, the contract is what they invoke. What are they really saying? Is that Dow Corning

somehow provides a justification for going back to the pre-bankruptcy state of the contract and in that case, says this bankruptcy never happened. That's not true, that's not something that comes out of the Dow Corning case, and for the following reasons.

First of all, the linchpin of this whole thing, which is impairment, the Dow Corning case, the Court of Appeals, never address an impairment. It wasn't address at the bankruptcy court level, also wasn't addressed at the appellate court level. And, so, in terms of the structure that we've laid out and the importance of maintaining that structure, including impairment, the Court of Appeals decision in Dow Corning provides zero justification for their construction of impairment and, therefore, zero justification for blitzing through impairment to get to fair and equitable.

Why is it that the court didn't consider impairment in the Dow Corning case and why is it that Dow Corning so carefully focuses on the contract? And this is something that you have to go and study the opinions very carefully, but this is actually what occurred.

The original plan provided for the federal judgment rate. So, under the first plan, you had the federal judgment rate. That was the subject of the Dow 1, the bankruptcy court's decision in Dow 1. In Dow 2, the bankruptcy court came back said, well, wait a minute, that's fair and equitable,

that's the federal judgment rate but you still have to have, you still have to meet 1129.

And, in light of that, the plan was amended and the plan was amended to read, that it would be the rate under the contract. That's what the plan actually provided. And if you take a look at the language in the opinion, it says, this is reciting the district court's opinion below, it noted that the amended plan provided for post petition interest at the applicable contract rate, in effect, on May 15, 1995, the date Dow Corning's bankruptcy case commenced.

So, as a result of the litigation, the plan was amended and we got a new rate which was the contract rate. The question then was, well, which contract rate? And in Dow Corning 2, the court decided that it was the non-default contract rate.

Now, what's very important here is to recognize -- and that's ultimately what came on appeal, is whether it was the non-default rate or the default rate. So, you have the federal judgment rate which is here, it's lower, you have the non-default rate that's above that and then you get to the question of, well, should it be the default rate?

The key to the case is what actually was decided in Dow, in approving the non-default contract rate. And it's not the subject of the big Dow Corning decision because, basically, Judg Specter read it out in court and, therefore, when it came

on for approval by the district court, literally you had to get the transcript and read what Judge Specter had to say.

So, the key was, that because the plan had been amended and there was no appeal from the amended plan, this plan became final in this respect. That is the language that says, right under the contract, as of May 15, or whatever it was, became final. And, therefore, the issue that had to be taken up was not on a plan confirmation, it was an issue post plan confirmation that had to do with the interpretation of the plan. And, in fact, our first argument to the Sixth Circuit on behalf of Dow Corning was, you have go to with what the language of the plan is and Judge Specter got it right, he interpreted it right. And, you don't go back to 1129 or anything else because it's too late. The plan is final, this is all a question of contract interpretation, it's not a question of bankruptcy law, it's not a question of 1129. That was our position to the appellate court.

Ultimately, the appellate court focused on this question and took up the issue of interpretation. Interpretation. That was the whole issue. Why did the Dow Corning court in the Sixth Circuit keep on going back to the contract, the contract, the contract? It's not because oh, we got to go back to pre-bankruptcy days, where everything was rosy and terrific and ignore the bankruptcy, it's because the plan referred to the contract. And everybody was interpreting

the plan, therefore, interpreting what under the contract meant. That was the issue, totally interpretation, it was not actually an 1129 holding, in confirmation. It was post confirmation.

What the court of appeals then did was to say, we want to interpret the plan and we need to do so consistent with 1129. And we find that to interpret the contract consistent with 1129, it's got to be the default rate. That's what happened in the case.

Now, you say, well, what does that tell us? It tells us number one, that the reason that the court is so focused on the contract is not because it's returning to the status quo ante from a Chapter 11 filing, to the contrary, it's beginning at the other end with the plan because the plan calls for the contract. That's why the contract is relevant.

Number two, the analysis under 1129 interpreting the contract does say that the better answer is default. And, obviously, we disagree with that for a whole variety of circumstances but two things are very apparent. First of all, when 1129, when the Court looks at 1129, which is fair and equitable, fairness and equity have to be determined hugely by the contract because that's what the plan says.

So, not only is this a question of interpretation of the plan, and 1129 as an environment in which the plan is going to be interpreted, but because this particular plan under 1129

refers to the contract, the fair and equitable analysis has to focus on the contract. So, it is a guarantee, both by virtue of the issue that was post the court of appeals, as well as by the plan read, that the dominant consideration was going to be the language of the contract and not because they were adopted and the Sixth Circuit was adopting the broad propositions that are now being argued to the court.

But even more importantly, what about impairment? The court never considered impairment because it wasn't really going through the confirmation of the plan, it simply was construing the plan in light of 1129. So, it never engaged in the step by step process of going through allowability, going through impairment, before getting to 1129. Never touched it.

So, when they argue here that somehow the Sixth Circuit's decision is also critically important, then basically says you look to the pre-bankruptcy world, really, in language that is directly opposed to the Third Circuit in PPIE, they're completely mischaracterizing, missing the boat on the Dow Corning decision. The contract was a focus because it was in the plan, the contract was being interpreted in light of fair and equitable, and fair and equitable had to come back to the contract and fair and equitable was applied completely without regard to the impairment analysis, because the impairment analysis was really irrelevant. They wanted to construe an already existing agreement in light of 1129.

Again, we disagree, we didn't see how they could do that, but that's what they decided to do. It does not stand for the proposition that they're venturing here today.

That's all I got.

THE COURT: All right, gentlemen, we literally have five minutes.

MR. PASQUALE: But, Your Honor, Mr. Bernick took my time.

THE COURT: I know, but, you know, if we need to adjourn it again, we'll do that.

MR. PASQUALE: I don't need more -- I had five, I'll make it two.

THE COURT: All right.

MR. PASQUALE: Your Honor, you've already heard from me on Coram, I don't think Mr. Bernick really distinguished at all the point I was raising from it, I know Your Honor will read it in rendering a decision.

But let me talk for a minute about Valley View, which is a case Grace did cite. We have distinguished it in our brief, but two quick points on Valley View.

It's not on point at all. What one of the parties tried to do in Valley View, for purposes of the best interest test, at 1129(a)(7), is to argue that solvency was determined based on a date earlier in the case, based on some unrelated testimony, and the court concluded and this is on -- I'm sorry,

Your Honor, Page 30 of the decision, it's 260 B.R. 30. The court concludes that the party did not prove solvency because it had not shown the debtor was solvent on the effective date of the plan. Well, we're right back to where we've been and what we've been talking about. It doesn't help at all there.

As to feasibility, the court doesn't find the debtor is solvent, so feasible. The court looks at the feasibility test and 1129(a)(11) and says feasibility. That's it. You can piece the two together as the debtor tries, but it doesn't discuss anything in the manner in which we've been discussing here and Coram does.

Mr. Bernick said Mr. Frezza only focused on giving effect to the plan, for solvency and that's correct, no argument there. But we do have arguments other than that, if the Court feels. We think this is right for all the reasons I said earlier. And we have the Third Circuit in VFB, on the market cap test, and Mr. Bernick keeps trying to distinguish it. It's a Third Circuit case that says, stock price isn't important for these purposes.

And we also have the Toy Warehouse case which Mr. Freedman mentioned last time in arguing, which I think I forgot to bring up with me, which basically said that for Equity to have a recovery, the debtor has to be solvent. And that was cited in the record by Mr. Freedman.

Just one last thing, Your Honor. Mr. Bernick wanted

to use, and used his chart again. The number at the top for the asbestos PI number, that's their high estimate, the ACC and -- well, no I'm sorry, not the FCR, it's the ACC's high estimate. Grace's estimate, by Dr. Florence, is the line I drew. The high estimate, another chart, excuse me, another chart that Grace presented at the confirmation hearing, the Florence estimates are on the left, those were Grace's numbers.

If we're going to talk about who is taking a haircut and who is not, there's a stark difference between the top number that Grace used and the bottom number when we look at that. It's all relative, Your Honor. Thank you.

THE COURT: Mona, I think you'd better go, take my phone, in case they call. Tell them we're going to be a few minutes late. Mr. Cobb, can you do this in five minutes?

MR. COBB: I'm going to try and do it in three minutes, Your Honor.

THE COURT: Okay, go ahead.

MR. COBB: Very quickly. Dow focuses on impairment, now we see what he's trying to do. Federal judgment rate, Your Honor. If you buy that the federal judgment rate is the maximum rate of interest that we can recover, this argument makes sense. But what he does is, he says, federal judgment rate, and he builds this wonderful argument behind it. You've already identified that this is not the cap, it's not the only

recovery under 726, there's three possible recoveries. State rate, federal judgment rate, and also the contract rate. Don't buy into his argument, until you've resolved that issue first and you should resolve it in our favor. That's critical, Your Honor, as Mr. Bernick likes to say.

Your Honor, the second point that I'd like to make is on default -- Your Honor, it's the effect of default during the pendency of the bankruptcy that the bankruptcy code focuses on and what the code says is that during the pendency of the bankruptcy, in order to allow the debtors the opportunity to have a fresh start at the other end, you can't give effect to a default and then as a result take something away from the debtors that hinders or, you know, prevents them from reorganizing. That's not what we have here. We are at the end of the bankruptcy, the debtors have reorganized, okay? We're not trying to take something from the debtors, we are only trying to receive the contract right, okay? Very different situation, not Next Wave. Next Wave said that under -- you can't say that because the debtors have failed to pay, there's a default and you can take the license back. Very different. That's not what we have here. You're right, it's not a 365 case, it's interest to be paid at the confirmation stage.

Your Honor, the argument that I said was their final argument and I was surprised they even continued to make it,

Your Honor, 1129, 1129 -- Mr. Bernick put a quote up on the -- here's the problem, he didn't show you the whole section.

For purposes of this section, the condition of the plan be fair and equitable with respect to a class includes, what Mr. Bernick showed you was Part D, he tried to say, if you pay the full amount of the allowed claim, then you have satisfied the fair and equitable test. No, no, the word includes is critical, Your Honor. The definition of includes, it's not limiting. And that's how the courts get to a rate beyond -- that's how they get to interest on the allowed claim. Well, what if you never get here, it's not part of the allowed claims and that's just missing a significant part, a critical point in the code.

You don't satisfy the absolute priority rule by just paying the allowed claim. You have to pay at least that, but it could include more.

Your Honor, I encourage you to please read Manchester and Titus carefully. Titus never discusses 1129, never. It's a 502 case. It has nothing to do with 1129 and everybody takes a haircut, so you've got to take one, too. Manchester waiver, whatever. Your Honor, it didn't provide for post petition interest -- excuse me, it didn't provide for interest in the plan and the court said, you didn't show up and object and, therefore, you don't have the ability to object at this point.

You can call it whatever you'd like. The court throws in at the end, without any supporting case law or statutory authority, nothing, it just talks about everybody took a haircut and you should, too.

Your Honor, there's much to be -- you seem to be focused on the fact that everybody here is taking -- Equity is getting less than what they think they should receive, that the asbestos claimants are taking less, Mr. Bernick had some wonderfully colored charts that demonstrate that, Your Honor, we have a contract, the contract provides that when you don't pay our money back, you've got to pay interest at a certain rate. The tort claimants don't have a contract, they didn't reach a bargain or an agreement with the debtors before the bankruptcy that said, you know, if you harm us or if our claim arises based on our legal right to the claim, you have to pay us interest at a certain rate. We're different, we have that contract rate. And, Equity is at the end of the line, Your Honor. The debate is, what does Equity get that's left over after everyone is paid in full and the touchstone of that, Your Honor, is the contract. At the end of the case, you go back and look at, if Equity is getting something, if the debtors are solvent, then what should the creditor receive under its contract? And here, when they haven't repaid us, they have to pay the contract rate. Thank you.

THE COURT: Okay, I understood that argument.

MR. COBB: Got it.

THE COURT: All right, folks, we're adjourned. Thank you.

MR. COBB: Thank you, Your Honor.

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CERTIFICATION

I, ELAINE HOWELL, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter and to the best of my ability.

/s/ Elaine Howell Date: February 2, 2010

ELAINE HOWELL

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